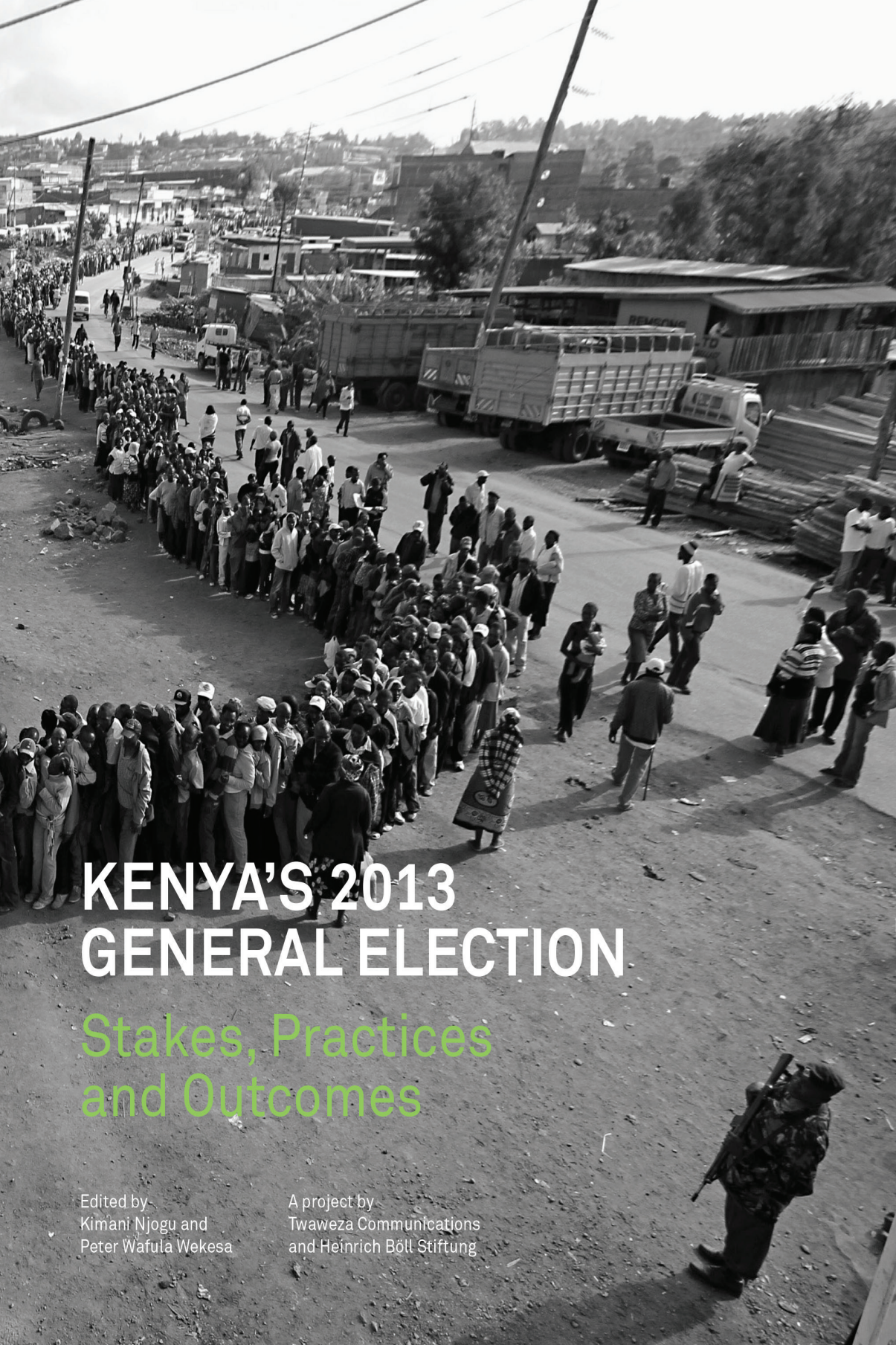




KENYA'S 2013 GENERAL ELECTION

Stakes, Practices and Outcomes

Edited by
Kimani Njogu and
Peter Wafula Wekesa

A project by
Twaweza Communications
and Heinrich Böll Stiftung

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**KENYA'S 2013
GENERAL ELECTION**

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Stiftung, East and Horn of Africa.

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*This book is dedicated to scholar-activists
who must make meaning out of these pages.*

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Kimani Njogu,
Peter Wafula Wekesa
Nairobi, November 2015

Foreword

Where political decision making seems far removed from citizens, elections are perceived as the opportunity to turn the tables; as the moment for voters to reclaim the power over the direction their country is taking. This might in part explain the unwavering enthusiasm surrounding elections although elections and electoral systems often fail to provide robust mechanisms for alternation in power and holding leaders accountable. Nevertheless or precisely because of this, elections have become an important area of study. Thus far, there are several articles and at least one book publication devoted to the 2013 General Election in Kenya. All of these scholarly efforts are trying to capture the essence of an election and its outcome that was anticipated with hope and anxiety in equal measures.

The 2013 election was the first to be conducted under a new constitution. Just as the resounding ‘Yes’ vote in the constitutional referendum in 2010 was an important milestone in dealing with the shock and trauma after the violence that followed the 2007 general election, the voting five years later was seen as an event which would demonstrate that Kenya was back on a peaceful path towards democratic governance. However, security was on everyone’s mind. Repeated calls for peace stood in stark contrast to polarizing campaign rhetoric liberally employing the trappings of identity politics. And while the latest reforms had boosted confidence that electoral institutions would safeguard free

and fair elections, it became clear that whatever the outcome it would be hotly contested, eventually leaving the country deeply divided.

Kenya's 2013 General Election: Stakes, Practices and Outcomes is the second Volume released by Twaweza Communications on the 2013 election. The first Volume *Kenya's Past as Prologue: Voters, Violence and the 2013 General Election* carries mainly ethnographic research undertaken by Kenyan and French academics. The Volume was released under a partnership between Twaweza Communications; French Institute for Research in Africa (IFRA); Heinrich Böll Stiftung, East and Horn of Africa; Afrique Contemporaine; and Agence Française de Développement (AFD).

This Volume is again an outcome of the partnership between Twaweza Communications and the Heinrich Böll Stiftung, East and Horn of Africa with the kind support of the Goethe Institut. It is multi-disciplinary in approach and draws on reflections by mainly Kenyan academics and civil society actors. The volume examines the drivers of the 2013 general elections and the sources of the mandate to lead. The authors show how ethnic identity loyalty, access to economic resources, weaknesses in governance institutions and events at the International Criminal Court may have shaped the outcomes of the general election. Throughout the volume there are reflections on how Kenya can improve political representation through the electoral process. We believe that the volume will enhance debate on the role of elections in the consolidation of democracy in Kenya.

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Introduction

Elections, as formal decision-making processes by which populations choose individuals to hold public office, usually provide unique reflective moments which are punctuated by myriad experiences not just from the action of polling itself but more significantly by the implications of the lengthy electoral process. But as Kadima & Owuor (2006:182) have noted, ‘periodic elections are not in themselves a guarantee of sustainable democracy.’ Rules that ensure a level playing field, strong and credible institutions, and the rule of law are necessary conditions for democratic elections. All democratic societies hold elections essentially because they are at the core of representative governments in which authority is derived from the consent of the governed. Elections therefore mark continuous processes of mutually negotiated mechanisms in which the consent of the governed is reflected in governmental authority. They define the manner in which the wishes of the voters are translated into representation at the legislative and other decision-making levels of government. Yet the reality on the conduct of elections world over is riddled with various levels of contestations. Whereas all democracies hold elections, not all elections have turned out to be free, fair and inclusive. Many do not represent the ‘will of the people’ because many are riddled with malpractices as contestants seek to acquire or maintain power. The challenge then is how to build credible electoral institutions, build a culture of transparency and accountability and establish credible links between past and present electoral processes in the continuous endeavour of building democratic transitions. Elections need not be mere symbolic events but concrete milestones in the pursuit of a democratic culture. They are supposed to be free, fair, competitive, periodic and inclusive experiences through which leaders are chosen.

Kenya has held several general elections since attaining independence in 1963. Through these elections, the country has had relatively stable and peaceful political transitions. But some of the elections have witnessed varying levels of

contestations and violence, thus casting doubt about their legitimacy and prospect as avenues of entrenching a democratic culture in the country. Although general elections have provided a space in which the Kenyan people have exercised their sovereignty by choosing their representatives, questions about the inclusiveness of the process linger. Claims of rigging, bribery, corruption and manipulation of public institutions by candidates are made at every general election. It is thus necessary that debates around general elections are sustained in an effort of making the process transparent, free and fair and so that the ideals of democracy and the commitment of binding society together for socio-economic and political development are safeguarded. The electoral process ought to enhance the ideas of security, safeguards against any violations of individual liberty, human rights and access to basic rights such as health, education and shelter.

At the heart of the debate on Kenyan elections are two related concerns: the desire for a democratic practice that is both inclusive and representative, and the resolution of deep seated ethnic claims and grievances. Since negotiated democracy in Kenya is a desire for most Kenyans, the mechanism of achieving this through credible elections that accommodate different interests ought to be sought purposefully and rigorously. The Constitution of Kenya, promulgated on 27 August 2010 was supposed to streamline the electoral process and build accountability systems that would ensure that elections contribute to democracy in Kenya through equitable representation (of ethnic groups and minorities), devolution of constitutional responsibilities to regions or districts, more equitable distribution of income and employment opportunities, reduction of executive power, more integrity and ethical practices among leaders, and wider representation in the electoral commission and public service among others. Looking at the practices around the 2013 general election and as the chapters in this volume attest, it would appear that the Constitution, however liberal, needs to be imbued with a culture of constitutionalism if it is to ensure quality representation and contribute to a socio-economic and political transformation agenda.

This Volume is the second of a series published by Twaweza Communications on the 2013 elections in Kenya. The first, *Kenya's Past as Prologue: Voters, Violence, and the 2013 General Election* resulted from a partnership with French Institute for Research in Africa (IFRA), the Heinrich Böll Stiftung, East and Horn of Africa; Agence Française de Développement (AFD) and Afrique Contempo-

rairie. *Kenya's Past as Prologue* adopts an ethnographic approach and relies on in depth interviews and on site participant observations. *Kenya's 2013 General Election: Stakes, Practices and Outcomes* is also a product of collaboration; it has been released through a partnership between Twaweza Communications and Heinrich Böll Stiftung, East and Horn of Africa. The purpose of these volumes is to enhance perspectives on the 2013 general election in Kenya and open debate on innovative ways of building more inclusive, democratic and just societies in Africa.

Although the 2013 general election represented several continuities with the previous ones, it also recorded a number of firsts as far as the country's transition to democracy is concerned. It must be recalled that the March 4, 2013 general election was the tenth since Kenya's independence. It was the first general election to be held under a new constitution and a raft of other new legislative measures. Consequently, the election was not only complex but also signalled multiple transitions in the country. These transitions included the end of the Grand Coalition Government that had been in place following the disputed 2007 elections, and the ushering in of a new government to carry forward the implementation of the new constitution including the creation of new governance structures, layers and levels of representation and institutions. In addition to voting for the President and an expanded National Assembly, Kenyans were for the first time to vote for the new elective positions of Women Representatives, Senators, County Governors and Members of County Assemblies. The continuities and discontinuities around the 2013 elections define the intellectual synergy upon which the contributions in this book are shaped.

The overriding thesis in the book is that although free and fair elections are not a sufficient condition for the evolution of a democratic state, they are a necessary condition. They pave the way for strengthening of governance institutions that buttress democratic practices. Yet, past election experiences in Kenya have revealed that such optimism for the future need to be sustained through continuous reflection and knowledge sharing so that the gains achieved are not undermined by bad practice. As the book argues elections in Kenya have continued to retain a strong ethnic dimension, with polarization and divisions along ethnic, regional and other cleavages being a common feature. Consequently, without a constant evaluation of prospects of electoral success and inclusivity social, economic and political drawbacks characterized by patronage, corruption and autocratic governance could solidify.

The researchers in this volume identify key themes that tie the various intellectual strands of the past and the 2013 elections and thus tease out important lessons that should inform future electoral processes and democratic change in Kenya and indeed elsewhere in Africa. These themes will certainly provide unique reflective debates around elections as opportune moments for rethinking progress rather than reversing gains already made in entrenching a sound democratic culture in the country.

Drivers of ‘Victory’ and ‘Loss’

Like all elections, Kenya’s 2013 experience provided a unique opportunity for scholars to reflect on the key factors that may have been considered by voters as they went to cast their ballots. The paradox between an individual’s decision to vote and the factors that inform such decisions form a central concern of this section of the book. It must be recalled that the 2013 general election was held within a context that was defined, but not exclusively limited, by the past electoral experiences in Kenya. How these contexts informed or failed to inform the decisions by the voters is an important entry into the various directions that the election took. Taking the assumption that voters are rational beings driven by a number of concerns including self-interest, individual aspirations and relations of trust, the key contributions in this section identify the key drivers such as land and property, ethnic identities, party alliances, security, and the International Criminal Court (ICC) among other factors that made the 2013 elections not only unique but complex. The 2013 general election only came to define the manner in which the wishes of the voters over the foregoing issues were translated into the final outcome of the process.

Political ethnic identity has always remained at the centre of Kenya’s electoral politics, despite the fact that ethnic groups are not internally homogeneous. It seems to have informed the choices made by the various voters in the country as voters seek to have ‘one of their own’ in power. With Kenya’s complex history of ethnic conflict that culminated in the country’s worst electoral violence of 2007–08, it is necessary to interrogate this phenomenon as a key driver. Previous electoral contests that have led to death and displacements makes it urgent that researchers revisit the complex but sometime emotive history of political ethnicity that has deeply troubled the country. Analysis that hinges the ethnic debate on the twin tragedies of colonial and post-colonial exploitation as the central drivers that continue to condemn Kenyans to fall

back to ethnic choices is insufficient. It is necessary to interrogate how violent struggle over scarce resources and offices of power, against a backdrop of widespread institutional failure, has contributed to consolidation of ethnic identity for survival and sustenance. Both Adams Oloo and George Omondi revisit the issue of ethnicity as a key driver in Kenya's politics with a sustained view on its direct implications on the 2013 general election. For Adams Oloo, the 2013 general election represented a clear case in which ethnic identity triumphed over ideology. In his discussion of oligarchy and how it is consolidating itself on the backbone of ethnic identity, George Omondi takes a swipe at the limitations in Kenya's electoral process and the political environment which entailed 'vital pre-election variables' that led to weaknesses in the electoral process. Such pre-electoral variables were central in generating several tyrannies beyond numbers that were reflected in the existence of strong social and economic elites that generate sharp ethnic divisions. Rather than simply focus on the obvious debates on the 'tyranny of numbers' arising from various ethnic combinations, Kenyans need to also worry about the entrenched wealth holders intent on retaining state power to protect current wealth and acquire more, in a vicious cycle of accumulation and protection of wealth through the state.

The issue of land, like ethnicity, has historically provided the lever upon which Kenyan politics have revolved. In fact, the democratic trajectory in Kenya has been driven by the land variable—whether in terms of access, control, management or use (Njogu, 2015). There is probably no issue in Kenya that arrests the attention of the citizens like land. From the colonial times, the solution to the land issue has proven intractable in law and policy. Indeed at each juncture of political transitions, land has been a core point of contention and contestation. How did concerns over land and property determine the way people voted in the 2013 elections? Kameri-Mbote's contribution in the volume emphasizes the centrality of the land question in the political, social and economic development of Kenya. The author highlights the historical nature of the land question and particularly observes that independence Constitution glossed over the issue of land and did not provide for it as a separate category of property. The failure to comprehensively deal with the land issue has made it a convenient space for contestation, which has resulted in violent clashes in different historical periods. According to the author, however, the Constitution of Kenya 2010 addressed the issue of land holistically, including tenure, planning and sustainability. By tying the land question to the 2013 elections, Kameri-

Mbote argues that since land is directly linked to identity and survival, hence the issue of citizenship, it played a significant function in the determination of inclusion and exclusion. It is, however, oftentimes muted until hostilities and outright violence flare up before, during or after elections. The chapter majorly looks at the way in which the Constitution addresses the land question and discusses the voter patterns and their link to the land question in the 2013 presidential elections.

In any democratic election, political coalitions and parties ought to be role models of good governance and democracy. Credibility and integrity of a political coalition and party determines the quality of leadership it provides. To what extent then did political coalitions and parties make meaningful strides toward a democratic state and society during the 2013 elections? This is a question that preoccupies the various contributors in this section. It must be recalled that political coalitions and parties in Kenya retain a strong ethnic dimension, with polarisation and divisions along ethnic, regional and other cleavages a common feature. Most if not all coalitions and parties resonate around ethnic political barons, with very few 'ideological' differences between them. Party hopping has remained a common feature with politicians switching parties and coalitions frequently depending on their personal evaluation of prospects of electoral success and inclusion in the future government. As such coalitions and parties are often overly manipulated to address short-term goals rather than inculcating enduring democratic culture. Both Anyang' Nyong'o's and Felix Kiruthu's chapters in this collection provide fresh insights into the debates on political parties and coalitions using the experience of the 2013 elections. Nyong'o's contribution particularly emphasizes the fact that coalitions that arose among parties toward the 2013 elections were based on distributive politics. In cases where it became unlikely that the vote may not win the majority for certain leaders and their coalition partners, the fear of losing elections usually created temptations to use coercion to determine the win. It is useful then to interrogate, as the author suggests, the ideologies or ideas that mobilize people to join parties or form coalitions and establish whether those ideas are progressive or retrogressive, inclusive or exclusive, democratic or fascist, parochial or universal. It is only through this that coalitions and political parties can democratize their structures and adhere them to party regulations and electoral procedures, widening participation among the electorate and limiting central leadership interference. This would in future elections certainly impact positively on the overall percep-

tion and respect for free and fair electoral processes. Kiruthu on his part pitches his analysis beyond the organization narrative within the individual parties that competed for power in 2013 and specifically stresses on the rationale and consequences of the various political party organizations. Kiruthu's view is that the parties and alliances in the 2013 elections took shape in the period prior to this election and thus retained the ethnic interests and non-ideological baggage that made them less inclusive. As a way forward for the future, Kiruthu suggests that parties should borrow best practices from Western democracies as well as engage more rigorously in civic education to enhance internal party democracies. Internal party democracy will certainly address the endemic problem of lack of transparency and accountability. It would allow the parties to have clear structures, rules, procedures, norms and principles and help them operate within specified legal frameworks that define their membership, composition, roles and functions, financial base, and operational rules and discipline. Further Kiruthu's view is that in future elections there is need for constitutionally sanctioned processes which would ensure that all the regions in the country have access to political leadership at the highest level of authority. This view suggests reforming the Constitution, a suggestion that Michael Chege also gives as he discusses Mixed Member Proportional Representation (MMPR) as a viable electoral system for Kenya.

Are political parties and coalitions in themselves enough for one to get elected into political office? Certainly not. As Nyairo's contribution to this volume reveals, beyond the parties and coalitions are more subtle and obviously less appreciated moments created through the campaigns that eventually come to bear on the choices and electoral outcomes. These campaign rallies, as Nyairo observes, provide a rare crystallized moment in which we can study emerging trends in our nation's political culture against the backdrop of everyday struggles and the ways in which ordinary people loop into and out of political spaces. Sometimes the people exploit these spaces for their personal gain but, more often, they are overrun and shaped by the callous needs of the political class. Nyairo uses the past and the 2013 campaigns to ably demonstrate how such forums provide an opportunity for potential leaders to master their craft, persuade voters and construct causes that link their pasts to the present. By reading the electoral campaign as a performance, Nyairo seems to be urging us to reflect on the discourse of political persuasion and framing as we seek to understand voters' decision making processes.

Local general elections can also be shaped by events in the global arena. The 2013 elections were held at a time when the international Criminal Court (ICC) indictments against Uhuru Kenyatta and William Ruto, the presidential candidate and running mate on the Jubilee alliance respectively, were taking shape at The Hague. Key questions on whether the ICC as an external factor played a critical role before and during the 2013 elections have generated myriad responses from several scholars. The important issues raised in this book regard the extent to which the ICC influenced the decisions around the 2013 elections and whether or not there were any lessons learnt that could further the scholarly debate and reflection on the future democratic practice in the country. It must be recalled that the ICC process provided the intellectual thread that defined Kenyan electoral politics long before the 2013 elections. First, there were debates on whether the indictees were eligible candidates on account of Chapter Six of the Constitution related to leadership and integrity, an issue that the courts ruled affirmatively. Secondly, it became obvious the ICC process later became politicized and ethnicised, with extensive debates on whether the process addressed impunity or challenged Kenya's sovereignty. Lastly, there were debates about the possible consequences of the ICC indictees winning the elections. The key contributors in this book weave together the various perspectives on and around the ICC especially on the way they came to be manifested in various spaces on which Kenyan issues were debated. Peter Kagwanja's contribution specifically puts the ICC debate within perspective by emphasizing the various divided interpretations generated around the ICC process. Whereas some analysts, according to Kagwanja, saw the ICC process as representing an emerging supranational configuration of power with its attendant cosmopolitan and universalism ideals, others saw it as tool used by powerful nations to erode the sovereignty of African states in the new geopolitical struggles for dominance and control. In a more nuanced way, Kenya's 2013 elections revealed the vagaries and limits of the various readings around the ICC and indeed catapulted the country to the epicentre of such narration and discourse. This issue is further picked by Tom Wolf who argues that the indictment of Uhuru Kenyatta and William Ruto by the International Criminal Court (ICC), which at first appeared as a liability, was turned into an vital to gain political power. Wolf's detailed contribution focuses on the ICC's role in Jubilee's triumph in the 2013 election. While considering the outcome of the Kenya's 2013 presidential election, the chapter addresses how what was initially considered a fatal liability—the

ICC indictment of Uhuru Kenyatta and William Ruto eventually became an important, if not their most vital, asset. On his part, Gakero Gachigua examines the ICC through the eyes of cartoonists and specifically calls the reader's attention to the various multiple stages of an election process. Gachigua's contribution focuses on how editorial cartoons between 2009 and March 2013 in four Kenyan national newspapers depicted the ICC involvement in Kenya and the political elite reaction therefrom. Gakero's chapter thus amplifies the use of cartoon as a useful genre and space for documenting and critiquing social political issues. The ways in which this space advances democratic culture and practice need to be considered not just for the 2013 elections but during future elections as well.

Sources of the Mandate

To understand and indeed appreciate the events around the 2013 elections one needs to pay attention to the role of the various election related systems and instruments in the management of elections. It must be recalled that following the previous negative experiences with elections especially the one that resulted into the 2007–2008 post-election violence, the government embarked on various steps towards ensuring that widespread violence would not recur in the subsequent elections. In contrast with the 2007–2008 electoral experience, it was not only necessary that various systems and instruments be put in place but that also they retained public trust. The Kenyan constitution, together with the various new laws and institutional arrangements, were meant to create new mechanisms for a transparent conduct of elections as well as a renewal in the public confidence in key public institutions. Towards the 2013 elections, both the judiciary and the Independent Electoral and Boundaries Commission (IEBC) among other institutions made significant gains in as far as public trust was concerned. The key question being interrogated within this section of the book is how the mandate of the various institutions was discharged before, during and after the elections and whether this mandate ensured that the 2013 elections were free, peaceful and fair. Are there specific lessons to be learnt from the discharge or failures in mandate for enhancing a more transparent electoral process in the future?

Peter Wekesa's contribution focuses on the IEBC as one of the key institutions that was formed and tasked with overseeing the implementation of the

various electoral reforms, as well as the monitoring of elections and dissemination of important information to Kenyans, new registrations and logistical details for polling centres on Election Day. The core and most cardinal mandate of the IEBC was to ensure credible, free and fair elections by among other things supervising of elections, registration of voters, regulation of political parties, voter education, settlement of voter disputes and the reformation of the electoral processes and systems. Wekesa's chapter interrogates the ways in which the IEBC discharged its mandate during the 2013 elections from the hindsight of the reform initiatives undertaken before the elections and the mounting debates towards its disbandment after the elections. Did the IEBC stand the test of time as an impartial institution or it conformed to the diverse polarized interests that are manifest in Kenya's pluralistic society? As Wekesa's observes, the sustained post 2013 polarized positions over the IEBC's mandate in the 2013 elections shows that there has only been a ceasefire over critical national issues. Although this may pose a worrying trend, it also opens an opportunity for frank and open discussions around key national institutions in an effort to build confidence in the public before the 2017 elections.

As Kenya prepared for the 2013 elections, there were concerns about insecurity in some parts of the country. Pre-election violence, comprising inter-communal and resource based conflicts had caused human displacement especially in some parts of coastal, North Eastern, Rift valley, Bungoma and Busia areas of western Kenya. Some of these conflicts were linked to struggles for political power and in particular, competition to gain control of the devolved system of government. As the 2013 elections approached there were genuine fears that insecurity was going to play out at the elections. This was so because elections in Kenya usually have high political stakes and are polarized. Katumanga's contribution to this book is premised on the fact that as part of development process, the political maturation of a given society may be measured by the existence of a political culture that underpins electoral cycles; each cycle being an improvement of the preceding one. In his view, the place of internal security instruments in conceiving electoral behavior and outcomes is central for state viability. Katumanga observes that the reoccurrence of planned violence, in electoral cycles as it happened in parts of Kenya before the 2013 elections, became a threat not only to stateness but also to state consolidation and legitimization. The author's view is that the probability that the broad electoral outcome of

2013 could have been rooted in the failed process of state ability to dominate instruments of violence to guarantee security should provide useful mitigating lessons for future elections.

Media in Kenya have generally been viewed as the people's watchdog through balanced and responsible reporting. The country's media have not only been vibrant and well developed but have also had a long tradition of being critical and incisive as they report especially on various economic and political issues. But media also reflect contradictions of the larger society. In 2007 for instance, some media houses were noted to have stirred tensions by taking sides and providing politicians with avenues to disseminate hate speech. The media coverage of the 2013 elections was obvious conscious of the bitter criticism of their performance during the 2007 elections. How then did the media discharge their mandate during the 2013 elections and how can responsible reporting be enhanced around the electoral period? These are critical issues being addressed in Benequista's chapter. The author observes that in the wake of Kenya's 2013 elections, a debate simmered over whether the mainstream media sacrificed their duty to report the truth to preserve the peace. But whereas this discussion has been fruitful, the author notes that it has placed undue emphasis on the journalistic agency, without taking into consideration the structural factors that contributed to shaping coverage. It is the author's view that beyond the discussions, we need to deepen the conversation by shedding light on what choices Kenyan journalists actually had—and how those choices might be widened in the future.

The proliferation of information and communication technology (ICT) in Kenya has brought with it tremendous positive changes in the socio-economic and political development of the country. The internet and mobile phones have ushered in renewed interest in the need to adopt such technologies during elections. As is evident elsewhere in the world such adoption of ICT would certainly increase administrative efficiency, reduce long-term costs, and enhance transparency in the electoral process. Though this also has its challenges, the use of technology in elections is certainly the best avenue for authenticating the democratic choices made by the voters and reducing cases of rigging and suspicion. Embracing ICT in the electoral process will thus certainly deepen Kenya's democratic culture and help ease the work of the bodies mandated to run elections. Warigia and Githaiga's chapter specifically focuses on how the ICT space was

used during the 2013 elections. The authors examine the ways in which ICTs were utilized in the 2013 elections to encourage voting, provide information about candidates, promote “peace speech,” improve the accuracy of elections and on the negative side, intimidate voters, among other political behaviours. The ways in which this space could be enhanced to promote democracy in Kenya’s future elections is an issue that needs to be deeply interrogated.

Mutuma Ruteere and Kamau Wairuri’s chapter raises a key question in regard to human rights violations related to Kenya’s elections. Kenya’s efforts to tackle a wide range of electoral human rights violations by security forces, including extrajudicial killings, arbitrary detentions, and torture have been slow and have overly left the various institutions charged with this mandate frustrated. Despite evidence of these abuses, the government rarely investigates or prosecutes the offenders. Ruteere and Wairuri observe that although previous studies on human rights violations have focused on the patterns, the nature of the violations and the assessment of the relevant norms that these acts transgress, they have failed to pay attention to the explanations of why the violations occur. According to these authors, the latter omissions are not surprising given that human rights approaches have traditionally privileged the ethical evaluation of conduct over the socio-scientific conduct of such acts. Based on the previous electoral human rights violations in Kenya and the specific experiences emerging from the 2013 elections, the authors emphasize that there is need to bring on board more issues other than just ethical ones in order for practitioners to be able to design appropriate policy interventions. In the future it will be useful to understand not just the patterns and manifestations of such violations, but even more importantly, their explanations in order to enable the designing of mitigation measures and mechanisms for preventing them.

Before the 2013 elections, the Constitution of Kenya and other legal instruments sought to break the exclusionary practices that had dominated politics and to create higher representation of women in leadership. The key areas on which the constitution has focused include political rights, rights to economic independence and equality, access to education, the right to control sexual and reproductive lives, rights to children and property both within marriage and upon divorce, the right to safety in the work place, at home and in public places. The exclusionary practices against women have been shaped and perpetuated by several gender inequities that have continued to marginalize women from key

decision making processes. Women's exclusion has not only been a product of cultural and historical practices but also of the patriarchal nature of the state forming processes that have always favoured men. Jacqueline Oduol's contribution pays attention to the manner in which gender issues were negotiated by leaders and voters in the 2013 elections. Oduol's argument derives its inspiration from the fact that even before the 2013 elections, it was clear that patriarchy was set to claw back on the progressive and gender responsive provisions of the constitution. The paradox then is that although Kenya is rich on gender responsive policy and legislative frameworks compared to her neighbours like Tanzania and Uganda, it still remains the least responsive to gender issues. Specifically on the 2013 elections, Oduol observes that although these elections were organized against legislated quotas which were to be implemented through the constitutional 'not more than two thirds gender rule', the institutional duty bearers such as political parties, the IEBC, the Registrar of Political Parties and the National Police service did not ensure compliance to the electoral code of Conduct during elections or exercise respective authorities sufficiently. As lesson for the future Oduol suggests that the Kenyan model of negotiating gender issues in politics need to be revisited since it is one directional and thus continue to impede women's meaningful engagement in politics and electoral processes.

In order to address exclusionary practices, it is also possible to consider negotiated democracy as a mechanism through which power is shared in order to accommodate diverse interests. It has been widely applied in several contexts, including Kenya, in order to ensure that all interest groups within an electoral area, irrespective of their numerical numbers, are represented in governance. These interests could be regional, ethnic, clan, religious, gender, youth or other categories in the political system. Negotiated democracy, however, could undermine good accountable and effective governance because it is pegged on elite deals. To what extent does this model enhance or undermine democracy? Winnie Mitulla's contribution uses the 2013 elections to address this question by examining the concept and practice of negotiated democracy and its application in Migori, Nakuru and Busia counties. The chapter acknowledges negotiated democracy as a mechanism for power sharing among different categories of elites, but questions its credibility as a democratic instrument and mechanism for dispute resolution. As far as the author is concerned, the mechanism seems

to be a double-barrel that resolves one problem—tension among elite—and creates a new problem manifested in conflict between those negotiated-in, those negotiated-out and their respective political parties and constituencies. For this reason, the chapter raises a red flag not just on how negotiated democracy enhances democratic practice or undermines it but more critically on the specific issues that we need to consider when adopting this framework during future elections.

The judiciary has the mandate of arbitrating in electoral disputes. Due to interference by the executive over the years, citizen confidence was at the lowest levels before 2010. Yet, public confidence in key institutions charged with resolving election related disputes is not just a requirement but a necessary condition for the development of a country's democratic culture. What happened in Kenya after the aftermath of the 2013 elections bore even greater testimony to the fact that the culture of rule of law, democracy and constitutionalism was finally taking root in Kenya as a nation and among Kenyans as a people. The Supreme Court's confirmation of Uhuru Kenyatta's victory on March 30, and Raila Odinga's peaceful acceptance of the same calls for a reflection of not only how this outcome came about, but also its implications for Kenyan democracy, including the role of the judiciary in the country's democratisation process. So, why did the same parties who had earlier chose violence seek a judicial forum to resolve electoral squabbles? In what ways did the Supreme Court's ruling in 2013 strengthen the judiciary's role as a vehicle of democratisation? Justice Ojwang's contribution to this book sets out to address these concerns. The author observes that although dispute settlement following the declaration of election results, has been a matter of course since Kenya's independence in 1963, this subject presented entirely new questions in the aftermath of the promulgation of the 2010 Constitution. The Constitution, according to Ojwang made definite milestone in the country's progression towards constitutional governance. It not only underlined the object of fairness, and of the safeguarding of fundamental rights in all spheres of dispute settlement, but also established new reference-points, as regards electoral justice for posterity.

Finally, Michael Chege discusses reforming the electoral system and governance. He adduces evidence in support of a mixed member representative system for ethnically-divided societies like Kenya and argues that electoral systems reform alone would be inadequate to promote more political calm and inclusive-

ness without recourse to consociational measures like extended power sharing, decentralisation and federalism, political and cultural autonomy, as well as grand coalition governments. He challenges Kenyans to consider constitutional reforms in order to usher in more inclusive political participation.

This book is an invitation to more debate on general elections in Kenya. It points to a number of topics worth further discussion as we seek to understand how elections can become real opportunities for social, economic and political transformation in ethnically diverse societies.

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Part I
Drivers of ‘Victory’ and ‘Loss’

The Land Question and Voting Patterns in Kenya

PATRICIA KAMERI-MBOTE

Introduction

There is probably no issue in Kenya that arrests the attention of the people like land. From the colonial times, the solution to the land issue has proven intractable in law and policy. Indeed at each juncture of political transitions, land has been a core point of contention and contestation. The independence Constitution glossed over the issue of land and did not provide for it as a separate category of property. Commentators have argued that independence was granted on the basis of continuity of land relations, which favoured the rights of the colonial settlers and the handful of Africans that acquired land through a process of co-optation into the settler economy.¹ This ensured that the rights that had been vested would remain undisturbed. There is also the school of thought that opines that Africans' civil and political rights took centre stage in the independence Constitution with land rights being relegated to the back burner.² Irrespective of the view one takes, one thing is clear, land remains at the centre of the political, social and economic development in Kenya. The failure to comprehensively deal with the land issue has made it a convenient space for contestation, which has resulted in violent clashes in different historical periods. The most notable violence that had the land issue at its core was the 2007–2008 post-election violence in which more than 1133 people died.³ Land reform was identified as a key agenda item in the Kenya National Dialogue and Reconciliation process.

The Constitution of Kenya 2010 addresses the issue of land holistically, including tenure, planning and sustainability. This is a radical departure from the repealed Constitution, which lumped land with all other forms of property.⁴ Before the promulgation of the Constitution, the first-ever National Land Policy⁵ was crafted by government with broad participation of civil society actors and the academia.

This chapter looks at the role that land has played in elections in Kenya, especially the 2013 polls. We argue that land is linked to identity and survival, and hence the issues of citizenship and livelihood. In the exercise of one aspect of citizenship, voting for political representatives, land plays a significant function in the determination of inclusion and exclusion.⁶ Land is the locus upon which citizenship is predicated and any electoral process is linked to both geographic space (physical terra) and one's link to that space which determines participation in the electoral process. Voting rights are a function of citizenship and where one votes is determined by where one resides—nation, county and constituency. The delimitation of national, county and constituency boundaries is intrinsically linked to land. For individuals, it boils down to where one owns or possesses land. Consequently, those whose citizenship at national or local level is contested, such as women may have greater difficulty exercising their voting rights. Women's citizenship never fully coalesces because as daughters, they are expected to get married and move to their matrimonial domicile. Yet in their matrimonial domicile, they never fully belong and can be returned to their parents' homes where they will never belong.⁷

Historically, different actors have manipulated the boundaries of electoral units to favour their side.⁸ However, the land question is oftentimes muted until hostilities and outright violence flares up before, during or after elections. As Ndegwa (1997) argues, in multi-ethnic societies, the republican citizenship and allegiance to the ethnic polity contends with national citizenship and this can lead to conflict over democracy.

In framing the 2010 Constitution, citizenship in a multi-ethnic context played a key role.⁹ Issues of historical injustices, marginalisation and unequal development for different areas were foremost in the agenda of Kenyans. The Constitution seeks to ensure that Kenya progresses to an “open and democratic society based on human dignity, equality, equity and freedom.”¹⁰ It provides that Kenya is a sovereign state with a national government and 47 county governments.¹¹ Importantly, the Constitution presented a different governance struc-

ture and placed devolution at the centre of that structure. The adoption of a devolved system of government is intended to help address the country's past problems of inequity in development and resource distribution and lack of adequate involvement of citizens in governance. Devolution as a concept derives from, and is a form of, decentralisation, which basically refers to "the transfer of public authority, resources, and personnel from the national level to sub-national jurisdictions."¹² In a country where land comprises a major factor of production, devolution is likely to succeed or fail from the way in which we treat the land question.

This chapter is divided into five parts. Part one is the introduction; part two canvasses the land question; part three looks at the way in which the Constitution addresses the land question; part four discusses voter patterns and their link to the land question in the 2013 presidential elections; and part five concludes.

The land question

The land question in Kenya has been shaped by economic, political, social and legal parameters.¹³ These include the dependency of the economy on land making the issues of tenure, access, distribution and regulation critical. The political nuances of the land question can be traced to the colonial times when the acquisition of land for settlers entailed mass dislocation of Africans and their eventual confinement to defined areas that were less productive than those taken for European settlers.¹⁴ The colonial government alienated most of the agriculturally productive land for settler's agriculture particularly in what is present day Rift Valley and Central regions. This alienation generated a large number of squatters especially among the Kikuyu. Not surprisingly, land formed the primary grievance of Africans agitating for self-rule in the independence struggle. It was expected that the transfer of power from colonial authorities to indigenous elites would lead to fundamental restructuring of that legacy. But this did not materialise and the result was a general re-entrenchment and continuity of colonial land policies, laws and administrative infrastructure. This was because the decolonisation process of the Kenya colony represented an adaptive, co-optive and pre-emptive process, which gave the new power elites opportunities to gain access to the European economy.¹⁵ As an adaptive process, decolonisation had to be moulded, firstly, in a way that allowed the settlers to align themselves to the changed economic and political situation by identifying new centres of influence that were not overtly political. Secondly, it had to achieve

the aim of socialising and co-opting the new elite into the colonial political, economic and social patterns to ensure that this elite was able to rule functionally on an inherited political structure and co-operate with the outgoing rulers. Finally, the process was geared towards preventing the mobilisation of a nationalist base that would be opposed to continuation of colonial policies after independence.¹⁶

Land rights protection was deemed imperative for the conclusion of the independence talks held in Lancaster House from 1960–1962.¹⁷ The issue of the ‘landless natives’ proved a thorny one for this new government, prompting it to institute measures to appease the vocal Africans clamouring for the land taken from them.¹⁸ The African landed gentry, a small and very powerful minority who took positions of power after independence, proved invaluable and ensured that property rights systems introduced during colonialism continued operating even after power was passed on to the new government at independence.¹⁹

Immediate post-independence handling of the land question brought forth other contestations over land as the new government embarked on a resettlement programme for dispossessed populations by allocating land to squatters in parts of the country other than where they originally lived, principally in the Rift Valley and at the Coast.²⁰ The perception that ‘outsiders’ had been brought to take land belonging to ‘insiders’ without taking into account the rights and interests of the ‘insiders’ has made the ‘outsiders’ vulnerable as their rights to land are contested. The ‘outsiders’ comprise not only the resettled people but also those who bought land either through land buying companies or other private transactions. The Kalenjin community felt that ‘ancestral land’ was taken by ‘outsiders’.²¹ These grievances featured prominently in the 1992 and 1997 post-election violence. Kanyinga and Okello²² argue that land settlement has been the root cause of social tensions, which triggered political violence targeted at ‘invaders’ and that this was the case in both the Rift Valley and the Coast where land was similarly acquired without due regard to the Mijikenda who were its rightful claimants.²³ The founding President, Mzee Jomo Kenyatta, invoked the Constitution which allowed Kenyans to settle anywhere in the country. This has become problematic as ‘outsiders’ are singled out for eviction whenever there is contestation over land. The ethnic groups, rallying around land, have challenged this narrative using the discourse of exclusion, discrimination and historical injustices. As a consequence, the development of a cohesive Kenyan national polity remains a mirage.

The situation has been compounded by the failure of the post-independence leaders to craft a cohesive national polity resulting in people relying principally on their ethnic alliances to access resources, including political positions and land. Successive governments, particularly the Kenyatta and Moi regimes, used public land to reward supporters, gain favours from their supporters or ensure political patronage. The quest for different ethnic communities to get one of their own in State House has a lot to do with perceived enhanced access to resources that ‘their Man’ will ensure going by past regimes.²⁴ Consequently, there are very high stakes in each general election for different ethnic communities and their allies. Interestingly, Moi’s defence of the single-party State was based on his belief that multiparty politics would undermine ‘the State, polarise the country along tribal lines and plunge it into ethnic violence’.²⁵ His “prophesy” has been fulfilled because politically-instigated ethnic clashes touching on land have been witnessed in Kenya from the first multi-party election in 1992 to 2007, which was the worst.²⁶ The only violence-free election was in 2002 when the opposition united and crafted a common front to oust KANU, which had been in power since independence.

Indeed, Kenya’s politics and post-election violence commentators have pointed to unresolved historical land grievances, especially with regard to land allocation, as an important underlying factor in the violence.²⁷ The violence based on land has been recurring since the colonial times with the latest being in Mpeketoni in Lamu County in June 2014 and were all linked to land grievances.²⁸

The Constitution of Kenya (2010)

The 2010 Constitution and the National Land Policy—Sessional Paper No. 3 of 2009 (the first ever land policy in Kenya) contain detailed provisions aimed at tackling the land question. Significantly, the Constitution has a whole chapter dedicated to land and environment in addition to many other provisions related to land. The finalisation of the policy and eventual completion of the Constitution review process became an urgent agenda for Kenya after the disputed presidential poll in 2007 in which an estimated 3,561 injuries, 117,216 instances of property destruction, and 1,133 deaths and many²⁹ displaced during the two-months of sporadic but violent inter-ethnic fighting pitting the Party of National Unity (PNU) and the Orange Democratic Movement (ODM) supporters.³⁰ The

violence ended with the signing of the *Agreement on the Principles of Partnership of the Coalition Government* on 28th February 2008 and the establishment of a Grand Coalition Government. The agreement comprised four agenda items and land was covered under Agenda Four, which called for addressing and finding solutions to the long-standing issues including constitutional, legal and institutional reform; land reform; poverty, inequality and regional imbalances; unemployment particularly among the youth; consolidating national cohesion; and bringing about transparency, accountability and acting against impunity.³¹ It was recognised that land was among the underlying grievances that have remained unresolved over the years and resolving issues surrounding it was necessary if there was to be durable peace in Kenya.

The passing of the Constitution in a referendum on August 4, 2010 and its promulgation on August 27, 2010 provided an opportunity to implement the provisions of the Policy and thus deal with the land question holistically. It must be mentioned at the outset that the drafters of the Policy were informed by proposals for a new Constitution that had been generated from 2002 by the Constitution of Kenya Review Commission. Indeed, the proposals on land remained intact in the four drafts generated in the process and it is not surprising that they found their way into the proposed draft generated by the Committee of Experts, which was the subject of the referendum vote. What is significant, however, is the fact that constitutional proposals on land were hotly contested in the run-up to the referendum as illustrated by discussions of the parliamentary committee of the first harmonised draft of the Constitution generated by the Committee of Experts in January 2010 in Naivasha.³²

The opponents of the draft Constitution organised around the provisions on land and despite the fact that the Constitution was passed, there remains a strong albeit masked disquiet over the land issue.³³ This makes it a very convenient tool for use by politicians seeking support from areas that have land grievances as is discernible in the Lamu attacks.³⁴ Interestingly, the land issue in the Rift Valley was muted during the 2013 elections presumably because of the political alliance between the Kikuyu and the Kalenjin. There is no guarantee that violence is a thing of the past considering that there are still displaced persons who lost land and have neither been resettled nor been compensated. The pairing of President and Deputy President Candidates from the two ethnic groups, who are also the two persons identified as being most linked to the

2007–2008 elections, has resulted in a commonality of interest to come together to support their candidates in the face of proceedings against them at the International Criminal Court. Both ethnic groups now have ‘their man’ in power and this convergence of interests has ensured that the land issue is on the back burner, at least for the time being.

The 2013 general election voting behaviour

The behavior of voters is determined by a number of factors in any election. Ferree, Gibson and Long³⁵ argue that voting behaviour in Africa generally includes three sets of factors to explain the vote: ethnicity, performance and issues. Ethnic voting is by far the most well-known approach and uses the affinity between co-ethnic citizens and candidates to establish voter motivation. This explains why people vote for a person from their ethnic group even when there are no direct filial or friendship relationships. Having a fellow ethnic group member in power seems to assure the voters of benefits even when those are not promised. Co-ethnicity proves an especially strong predictor in the elections. Kenyan voters will normally consider the ethnic background of the candidate irrespective of their performance or issue-based policies.³⁶ It is interesting that while the number of the poor has grown and traverses ethnic boundaries, there is not as great a socio-economic class awareness as there is ethnic allegiance. Kenyans living in squalor in urban centres are easily mobilised to support one from their ethnic community against their next-door neighbours without questioning whose circumstances iterate to their own. Not surprisingly, electoral candidates have appealed on voters to shun the tribal appeal and vote for competent leaders. For instance Musalia Mudavadi stated in his Amani Coalition Manifesto, Whatever happens on March 4,

Do not waste your vote. Do not waste it on the tribal factor. Do not waste your vote building a political dynasty. Do not waste your vote on some obscure loyalties that can no longer take Kenya forward.³⁷

Odote³⁸ argues that land is man’s most valuable resource, supporting basic and critical needs of food, shelter and business. This is particularly true for Africa where economies rely heavily on agriculture, livestock production, tourism and the exploitation of natural resources. The prominence attached to land is a consequence of limited livelihood opportunities in manufacturing and industry.

Land, therefore, represents not just identity but social security and a fall back opportunity in a context where there is no framework for social protection nationally. This explains why any political coalition or political party with land as its key campaign agenda and promising to address land and property rights security will have a head start in the political contest. The nexus of land and property rights and voting patterns is twofold: there are those who will vote for the candidate who will protect their interests by maintaining the status quo and those who desire radical changes and reform in the land sector comprising the dispossessed and the landless. The voting behaviour has also taken on a regional dimension with the Coastal region and the Rift Valley (areas most affected by historical land injustices) voting for pro-land reform candidates. For instance, it is alleged that only a few rich individuals own some 70 per cent of land in Lamu County, while thousands of families settle on the remaining 30 per cent.³⁹

All presidential candidates and their coalitions addressed land in their manifestos. The Amani Coalition, for instance, promised a Marshall Plan⁴⁰ to increase land productivity through irrigation, addressing land use in arid and semi-arid areas and dealing with the ‘perennial problem of land records’ paying attention to the settlement of the rights of owners and tenants.⁴¹ The Jubilee Manifesto envisaged a property-owning democracy and focused on the transformation of property ownership and land use through increased titling and improvement of land information management systems.⁴² The Coalition for Reforms and Democracy (CORD) focused on addressing historical injustices related to land such as squatter problems, displacement of indigenous communities and involuntary resettlement of populations and improvement of land use.⁴³ The Manifestos formed an interesting basis for the Presidential Election Debates and land was a core part of those debates.

The 2013 elections had a historic voter turnout. Some 12.3 million voters went for the polls to elect a new President for the fifth time since the introduction of multiparty elections in 1992.⁴⁴ There were nine candidates but ended up being a two-horse race—Raila Odinga of Coalition for Reform and Democracy (CORD) and Uhuru Kenyatta of the Jubilee Coalition. Both candidates campaigned on different issues. Raila emphasised fighting corruption, land reform and social issues. During the campaigns he took swipes at the extensive land holdings of the Kenyatta family and derided his rival (Uhuru Kenyatta) to settle the landless in some of their land. The CORD Coalition approach to land drew

from deontological theories based on morality, corrective justice and equity.⁴⁵ They promised to implement the constitutional provisions on equality, participation and inclusion of marginalised groups and individuals.

It did not help the Jubilee Coalition that some of their luminaries were key opponents of the Constitution and land reform specifically in the run up to the referendum. Indeed the January 2010 Naivasha meeting on the Constitution referred to above had excised key provisions on land management at the behest of key figures in the Jubilee Coalition. Not surprisingly, Raila garnered great support from the Coastal region, which is the worst affected by unequal access to land and historical land injustices. Uhuru, on the other hand, drew from the utilitarian view of property in addressing land issues and was better on the campaign trail as a champion for economic growth making him the favourite of the business elite.⁴⁶ This is also the approach that the Jubilee Coalition has taken on the land issue. The aim of land reform as they envisaged and implemented is to unlock the potential of dead capital that land had remained for a long time.⁴⁷

Rift Valley and Coastal regions have been the hot beds of post-election violence related to land. The 2013 General Election was a reflection on how electorates from the two regions voted along land and property rights issues. The Coastal region, which has had, and still faces, land-related problems voted for the CORD Coalition which had promised to address the land issues and implement Chapter Five of the Constitution, which advocates for equal and equitable access to land and resolution of historical land injustice. For instance, CORD Coalition garnered 77 per cent from the Coastal region while in the Rift Valley they garnered less than 30 per cent. From the beginning, the Jubilee Coalition's zeal in implementing the land reform had been in doubt bearing in mind the large landholding of the Kenyatta family and Ruto's anti-land reform quest in the run up to the referendum in 2010.⁴⁸

The link between voting patterns and land was perhaps more blurred in the 2013 election when one looks at the Rift Valley and Central Province. As Cottrell and Ghai argue, Kenyans' votes remain largely ethnic, which goes beyond long-held antagonisms or friendships among ethnic groups.⁴⁹ Who would have envisioned the coming together of the Kalenjin and Kikuyu in 2013, when barely five years earlier they had fought over land in the 2007–2008 post-election violence and had key personalities from their communities at the International Criminal Court at The Hague accused of offences related to that violence? The argument that socio-economic class does not influence the bandying together of commu-

nities in the same way that ethnic identity does is illustrated here. Kikuyu and Kalenjin peasants rallied behind their ‘men’ to ward off the International Criminal Court threat, forgetting their own losses and pain during and after the 2007–2008 post-election violence. The external actor (ICC) presented a more menacing threat for both the Kalenjin and the Kikuyu than the ‘other’ ethnic community, which was confronted by the same threat. While the Coastal region voted overwhelmingly for the CORD Coalition which had promised to address the land issues, in the Rift Valley, voters were not as eager to embrace the CORD agenda owing to the lingering issue of the Mau Forest Restoration, which is a core issue in Chapter Five of the Constitution. The restoration of the Mau Forest, which entails eviction of persons living in the forest, threatens land and property rights of certain members of the Kalenjin community.

Central Province voters voted overwhelmingly for Jubilee Coalition despite the fact that there were three other candidates from their ethnic community.⁵⁰ Indeed for them, it seemed like the fear of isolation by other ethnic groups as had happened in 2007 was the primary driver in the 2013 elections. Considering that they comprise a big proportion of those resettled outside their original homes, assurance of political power was critical to their survival in those areas even though the attacks in Mpeketoni have debunked that narrative somewhat as many are still in camps and cannot return to their homes.

Conclusion

A number of key conclusions can be drawn from the discussion above. One, the land question(s) is alive and well and continues to mutate over time. It remains a convenient tool for politicians to use to rally voters and the agitation has become more violent over time. This points to the need to holistically address it and the Constitution is a good starting point. Good will and honesty from all concerned is essential to finding a durable solution to the land question.

Two, inasmuch as Kenyan general elections are largely determined by ethnicity, land is also a critical determinant when it comes to voting. Whether voting with the hope that historical land injustices will be solved or hoping to retain land rights that have been acquired legally outside of one’s ‘designated ethnic home’ or those that have been illegally acquired, the preferred candidate will be the one most likely to protect one’s identified interests. This is amply demonstrated in the outcomes of the 2013 elections and the developments thereafter.

Three, as devolution is implemented and national and county governments contend for power, the cleavages of national and ethnic/republican citizenship will be widened. This does not augur well for the Kenyan national polity and ways of ensuring inclusion and tolerance for difference and diversity has probably never been more urgent than it is now.

Lastly, both moral/equality (deontological) and utilitarian/efficiency approaches to the land question are important in dealing with land in Kenya. In the quest to formalise land ownership through titling to unlock the productive potential of land (a key thrust of the utilitarian/efficiency approach), the issues of equity, inclusion and fairness (deontology) should be taken into consideration. This calls for the bridging of the approaches of the two main coalitions in the 2013 elections. Failure to consider these issues together will imperil the foundation of the property institution in Kenya and reduce land titles to mere pieces of paper that are not respected because they will be perceived as exclusionary and out of touch with people's lives.

Notes

- 1** Gary Wasserman, *The Independence Bargain: Kenya Europeans and the Land Issue 1960–1962*, 11 J. Comm. Pol. Stud. (1973).
- 2** Mary Dudziac, *Exporting American Dreams: Thurgood Marshall's African Journey*, Oxford University Press (2008)
- 3** Kenya Human Rights Commission & International Federation for Human Rights, *Massive Internal Displacements in Kenya due to Politically Instigated Ethnic Clashes: Absence of Political and Humanitarian Responses*, 471(2), (2007).
- 4** Section 75 of the Constitution of Kenya (1969) as amended in 1997 (Repealed)
- 5** Republic of Kenya, *Sessional Paper Number 3 of 2009 on National Land Policy* (Government Printer, August, 2009)
- 6** See Stephen N. Ndegwa, 'Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics', *The American Political Science Review*, 91(3), (September 1997), pp.599–616.
- 7** Vicky Mucai-Kattambo et al., 'Law and the Status of Women', in Janet Kabeberi-Macharia ed., *Women, Laws, Customs and Practices in East Africa – Laying the Foundation*, Women and Law in East Africa(19915), p.80 Available from: <http://www.ielrc.org/content/a9501.pdf>
- 8** See e.g. Kimuli Kasara, 'Electoral Geography and Conflict: Examining the Redistricting through Violence in Kenya', November 5, 2014. Available from: <http://www.columbia.edu/~kk2432/WP/electoralgeography.pdf> <Accessed on 5th September 2015>
- 9** Yash Pal Ghai& Jill Cottrell Ghai, 'Introduction', in *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives*, Global Centre for Pluralism, Ottawa & Katiba Institute, Nairobi, 2013, p.6
- 10** Article 20 (4) (a), Constitution of Kenya, 2010
- 11** Article 6 Constitution of Kenya, 2010.
- 12** Ndegwa, S.N., 'Decentralisation in Africa: A Stock-taking Survey', *Africa Working Paper Series No. 40*, The World Bank, Washington, D.C., p.1. Available from: <http://www.worldbank.org/afr/wps/wp40.pdf>.
- 13** Patricia Kameri-Mbote, 'The Land Question in Kenya: Legal and Ethical Dimensions', in *Governance: Institutions and the Human Condition*, Strathmore University and Law Africa (2009), pp.219–246.
- 14** H. W. O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, ACTS Press, Nairobi (1991)
- 15** See Gary Wasserman, *The Independence Bargain: Kenya Europeans and the Land Issue 1960–1962*, 11 J. Comm. Pol. Stud. (1973).
- 16** *Ibid.*
- 17** See *Report of the Kenya Constitutional Conference* (1962).
- 18** The white highlands remained settler occupations and the settlers who wanted to divest themselves of rights in them sold their land for full value to Africans who could afford to buy it. Settlement schemes were however established in the Rift Valley to accommodate the landless. Some Africans questioned the repayment of loans advanced by the British government to the independence government to buy settler farms for resettlement of Africans. See Ann Seidman, *Agricultural Revolution*, 7 E. Afr. J.25 (1970) and J. Oginga Odinga, *Not Yet Uhuru*. East African Educational Publishers (1967).
- 19** See Ng'weno Osolo-Nasubo, *A Socio-Economic Study of the Kenya Highlands from 1900–1970: A Case-Study of the Uhuru Government*, Doctoral Thesis, Howard University (1977).
- 20** See generally Karuti Kanyinga, 'The Legacy of the White Highlands: Land Rights' Ethnicity and the post-2007 election Violence in Kenya'27(3) *Journal of Contemporary African Studies*, (2009), pp.325–344.
- 21** *Ibid.*
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The Triumph of Ethnic Identity over Ideology in the 2013 General Election in Kenya

ADAMS OLOO

Introduction

Elections in Kenya tend to revolve around identity politics (Oloo 2010). While there are different identities that have competed to influence the voting patterns in the country, the ethnic identity seems to have flourished over the years. This scenario has been replicated every election-year since the rebirth of multiparty elections in 1992. In 1992, the four main parties largely drew majority support from their ethnic base. The ruling party Kenya African National Union (KANU) drew most of its support from Kalenjinland which was the ethnic identity of Daniel arap Moi. The Democratic Party (DP) drew most of its support from Kikuyuland, specifically Nyeri and Kirinyaga from where Mwai Kibaki hailed from. FORD-Asili under Kenneth Matiba also largely drew its support from Kikuyuland, specifically Murang'a and Kiambu as well as Nairobi and parts of Rift Valley where the Kikuyu are domiciled and settled, while Jaramogi Odinga of FORD-Kenya drew his support from the Luo, the community from which he hails from.

The foregoing trend was replicated in 1997 when once more Daniel arap Moi got the majority of votes from his Kalenjin community and Mwai Kibaki got solid support from his Kikuyu community. Raila Odinga running on the National

Development Party ticket got majority support from the Luo community. Kijana Wamalwa running on the FORD-Kenya ticket got majority support from the Luhya community while Charity Ngilu running on the Social Democratic Party ticket got majority support from her Kamba community.

The 1992 and 1997 trend was replicated in 2002 but in nuanced complexions. The retiring incumbent, Daniel Moi, handpicked a Kikuyu successor who he bequeathed the Kalenjin vote as there was no Kalenjin presidential candidate. The opposition, on the other hand, having suffered two successive defeats against the incumbent ruling party formed an umbrella party (the National Alliance Rainbow Coalition [NARC]) to house the constituent parties which were still ethnic. This arrangement enabled them to have a common presidential candidate while guaranteeing support from their other bases through a Memorandum of Understanding (MoU) that divided slots some of which were non-existent but were anticipated in the new constitution. The corollary is that the support that Mwai Kibaki got from the non-Kikuyu ethnic groups was largely donated by the ethnic kingpins under the MoU—in this case, Wamalwa Kijana, Vice-President designate (Luhya), Raila Odinga, Prime Minister designate (Luo), Kalonzo Musyoka, 2nd Vice-President designate (Kamba) and Charity Ngilu, Deputy Prime Minister designate (Kamba). Kibaki, on his part, got mainly the Nyeri and Kirinyaga Kikuyu votes while Uhuru Kenyatta, the KANU flag bearer, got Kikuyu votes from Kiambu, Murang’a, Nairobi and Rift-Valley.

The other prominent identities that have attempted to gain a foothold in Kenyan politics include gender, youth and religion. The triumph of the ethnic identity in electioneering over the other identities has been attributed to the potency and the emotional attachment that both politicians and the citizenry have attached to it (Oloo 2010).

The genesis of voting along ethnic lines can be attributed to the nature of political parties as well as key political personalities that have shaped politics in the country. Most, if not all, of the key political parties that have contested for presidential elections have tended to revolve around five dominant ethnic groups reaching out to the other ethnic groups to top up the numbers. Although most parties are on paper formed along ideological lines to champion specific issues that are central to any component of the body politic, the reality on the ground has time and again compelled them to shift gear and re-embark on the ethnic route to remain politically relevant. On the same note, individual politicians from respective ethnic groups attract support not based on the ideas or

issues that they propagate but the extent to which they are perceived to have the political weight to bargain or defend their ethnic groups' interests.

The voting population has equally contributed to the pre-eminence of political mobilisation along ethnic lines as in every electoral year they have either eschewed ideological persuasions or failed to make demands on political parties and politicians to be policy or issue oriented so as to "win" their vote. This is further unraveled by the fact that the manifestos which are produced in every election year by the competing parties are more or less the same ideologically except for the details (FES 2010; Sebastian 2010). The differences by which the voter can make a choice are thus essentially negligible. Against this background, voters rarely get an informed opportunity to assess a party on the premise of their manifesto. The manifesto is merely a formality policy document that a party unveils as an "ideal" and to assuage donors and supporters. To this end, voters do not peruse and interrogate party manifestos and once a party/coalition is in power, the voters likewise rarely gauge a ruling party's/coalition's performance against the manifesto it campaigned on.

Voters especially in presidential elections more often than not look at electoral politics as purely a mechanism for ensuring their ethnic group's access to public goods. They rarely interrogate a candidate on the basis of the ability to deliver on the mandate but rather on the public goods that will trickle to their community. As a result, in 1992 and 1997 every dominant ethnic group voted for their own in the presidential elections. But in the post-1997 period, the realisation that no ethnic group can capture power on its own compelled dominant ethnic groups to seek the support of other groups. This practice has come to be referred to as topping up the votes. Consequently, the post-1997 General Election has been dominated with coalition politics. In order to remain competitive in electoral politics, the "Big Five" ethnic groups (Kikuyu [17.2 per cent], Luhya [13.8 per cent], Kalenjin [12.9 per cent], Luo [10.8 per cent] and Kamba [10.1 per cent]) (Republic of Kenya 2009) have tended to seek alliances in their quest to capture or retain political power. Where one of the "big five" does not field a presidential candidate, the ethnic group has tended to cast its lot with the party where one of its prominent sons is better placed to either influence the allocation of resources or assume the reigns of power. This is what influenced the support of the Luhya for Kenneth Matiba through Martin Shikuku and Wamalwa Kijana for Jaramogi Oginga in 1992 as well as the support that Mwai Kibaki received from other ethnic groups in 2002. The other ethnic groups have

tended to cast their lot with the party that is likely to incorporate their interests in the eventual government.

This chapter seeks to assess the drivers of victory and loss in the multiparty elections that have been conducted in Kenya since 1992. It focuses specifically on the 2013 general election with the goal of explaining the rationale behind the ethnic identity's triumph over ideas in the elections. It also demonstrates the reasons that inform the pre-eminence of the ethnic identity in the electioneering process among some communities/regions in comparison to others.

Multi-party elections in Kenya and the poverty of ideology

The one-party era was devoid of party competition and therefore ideological or issue-based politics at the national and local levels as competition was reduced to individuals with the variables determining electoral success or failure oscillating between clannism, development record and in cosmopolitan constituencies ethnicity and religion.

With the repeal of Section 2A of the Constitution that gave way to the re-introduction of multiparty politics in 1991, optimists hoped that having more than one party would not only offer alternative ideological choices but that issues rather than identity would be key determinants in the Kenyan body politic. Multipartyism was, therefore, expected to provide an alternative framework in the conduct of electoral politics and to this end midwife a transition to an ideological contestation in politics. However, this optimism was misplaced as political mobilisation along identity lines took a more vigorous turn as multipartyism simply expanded identity choices as opposed to offering alternative ideological choices.

Scholars have attributed the failure of ideology to influence voting patterns in Kenya to the fact that political parties broadly subscribe to a similar ideological orientation namely social democracy. Consequently, most parties tend to mobilise support along ethnic lines to tilt the voters to their respective parties (Oyugi 1997; Throup & Hornsby 1998; Oloo 2007).

The results of the 1992 general election demonstrated how the ethnic identity not only triumphed over ideas but also other identities. Of the Big Five ethnic groups, the Kalenjin voted for the incumbent President Daniel arap Moi of KANU to ensure their continued privileged status. They delivered 67.8 per cent of the Kalenjin dominated Rift Valley vote despite a large Kikuyu population among other ethnicities in the region. The Kikuyu voted for their own

(Kenneth Matiba of FORD-A and Mwai Kibaki of the Democratic Party [DP]) as a means to recapture power which had been lost with the ascendancy of Daniel Moi to power. Daniel Moi had succeeded Mzee Jomo Kenyatta who died in 1978. The Kikuyu's 96.1 per cent vote was split between Matiba and Kibaki. The Luo also voted for their own Jaramogi Odinga of FORD-K. They delivered 74.7 per cent of the Luo dominated Nyanza vote in spite of the existence of the Kisii and the Kuria in the province (Throup & Hornsby 1998; Oyugi 1998)

On the other hand, the two other big ethnic groups split their votes mainly because they did not either have a presidential candidate or a serious one at that. The Kamba split their votes between President Moi and Kibaki while the Luhya split their votes between President Moi, Matiba and Oginga Odinga. The voting patterns in these two communities were further influenced by the fact that their leaders were supporting different parties and did not present a united front. The Luhya of Bungoma and Trans-Nzoia (mainly Bukusu) voted for FORD-K out of respect for the late Luhya (Bukusu) politician Masinde Muliro who at the time of his death before the elections was aligned to the FORD-K faction. His kinsman Wamalwa Kijana, who supported Odinga's candidature, had secured the position of second vice-chairman and because the senior most Bukusu politician in FORD-K after Muliro's death. Those who voted for FORD-A (sections of Kakamega Luhya) did so in the belief that victory for FORD-A would put their man, Martin Shikuku, (then effectively Matiba's second in command) as the vice president of the country. The rest who voted for KANU possibly did so because of the belief that Musalia Mudavadi, a Luhya, was destined for political ascendancy under Moi's KANU (*See also* Oyugi 1998). In the end, the 1992 voting patterns demonstrated what David Horowitz characterised as an "ethnic census" of the loyalty of the big tribes (Horowitz 1985; Oloo 2010).

Likewise, the results of the 1997 General Election demonstrated the salience of ethnicity in voting patterns. The presidential candidates as well as party leaderships and the underlying ethnic alliances came through very clearly in the electoral results, particularly in the presidential contest. The Luo mobilised around one of their own, Raila Odinga, the Kikuyu around Mwai Kibaki, a great number of Luhya around Kijana Wamalwa, the Kalenjin around President Moi, and most Kamba's around Charity Ngilu. The political realignments that took place during this election provided an adequate illustration of the saliency of the ethnic identity. The move of the Luo leader, Odinga, from FORD-K to the National Democratic Party (NDP) saw FORD-K's performance dip in the Luo-

dominated Nyanza region from 70 per cent to a paltry 10 per cent. On the other hand, NDP took a dramatic rise as it garnered 48 per cent of the vote in the same region. NDP also won all parliamentary seats except two (one by default) which went to FORD-K which had previously won all the seats in the area in 1992. The Gem seat went to Ford-Kenya due to an electoral technicality that so the NDP candidate being barred from the contestation.

The case of FORD-A offers another illustrative case in this regard. The exit of Matiba from the presidential race saw most of its supporters troop to DP under the leadership of Kibaki. Consequently, FORD-A managed to secure only a single parliamentary seat, a great contrast from the 31 seats it had in 1992. Similarly, the exit of the Kamba tribe from DP in solidarity with Charity Ngilu to Social Democratic Party (SDP) led to a decline of the DP support base in Eastern Province from 43 per cent to 24 per cent (IED, CJPC and NCKK 1998; Oloo 2010; Elischer 2008).

Evidently, by the end of the first decade of multiparty politics, Kenyans had proven their penchant to vote along ethnic lines. It was against this background that the attempt by Ngilu to introduce and mobilise the gender identity in the 1997 General Election failed dismally. Ngilu, together with the other woman presidential candidate, managed to secure a paltry 7.98 per cent of the vote. This consisted of Wangari Maathai's 4,196 and Ngilu's 488,600. The male candidates together captured 92.02 per cent (IED, CJPC AND NCKK 1998). More significantly, Ngilu got most votes from her tribe. She scored 32 per cent in her native Eastern Region, 10 per cent in Nairobi and Coast regions, less than 2 per cent in Nyanza Region, 3 per cent in Central Region, and less than 1 per cent in Rift Valley, North Eastern and Western regions. In the parliamentary elections, there were 50 women candidates against 882 men. Only four women were elected (Grignon 2001). The foregoing attests to the fact that the gender identity and therefore attachment as a political mobilisation tool has not come of age in Kenya. This can be attributed to the fact that the identity of gender in the country is not as emotive as that of ethnicity as it does not have the ingredients of “belonging” or “community” that ethnicity in the country has evoked.

In the 1992 and 1997 elections, the incumbent President Moi and the ruling party KANU won. The opposition parties' inability to dethrone President Moi in two successive general elections was influenced by the Moi regime's ability to keep the opposition parties divided along ethnic lines. After a second successive defeat at the hands of Moi and KANU, the opposition applied the same “ethnic”

formula by uniting under the National Alliance Rainbow Coalition (NARC) in 2002, a coalition that came to be referred to as a conglomeration of “ethnic groups” as it represented the four big ethnic groups. Just as in 1992 where the Kikuyu had two strong candidates, the vote was divided according to district of origin or association. To this end, the Kikuyu split their votes along districts. Uhuru Kenyatta secured the votes from Murang’a and Kiambu as well as parts of Nairobi while Kibaki secured votes from Nyeri, Kirinyaga, parts of Nairobi and parts of Rift Valley. The coalescing parties included DP headed by Mwai Kibaki commonly identified with the Kikuyu community, LDP predominated by Luo, Kamba and Luhya communities, FORD-K with the Luhya, and National Party of Kenya (NPK) of Charity Ngilu with the Kamba community. Subsequently, the resultant Memorandum of Understanding (MoU) signed by the leaders representing the big four ethnic groups provided the platform for the then opposition’s mobilisation of members of the respective ethnic groups. This would see the electorate vote for NARC’s presidential candidate irrespective of his ethnic background as their interests were perceived to be secure under the MoU (Wanyande 2006).

As the foregoing attests, other identities have not had a direct bearing in the electioneering process the way ethnicity has. For instance, President Moi dangled the youth identity in an attempt to mobilise the youth around Uhuru Kenyatta (then 41 years) as the ruling party’s presidential candidate in 2002. Just like with the introduction of the gender identity in 1997, the mobilisation of the youth identity failed to change the voting patterns. The ethnic identity still held sway. The 2002 General Election was framed by the outgoing incumbent as a contest between the youthful leaders rallied around Uhuru Kenyatta and Mudavadi versus the old guards rallied around Kibaki, Wamalwa and Odinga. The youth agenda did not live to its billing. Uhuru Kenyatta, in the end, managed to secure a significant number of votes mainly from his ethnic kinsmen in Kiambu and Murang’a and from Kalenjin-land as a result of President Moi’s support and not across the ethnic divide from the youth. Neither was the battle in the 2002 elections an ideological divide between NARC and KANU.

The hotly contested 2007 General Election would again put to rest any challenge to the dominance of ethnicity as the main factor in determining the electorates’ voting patterns. Despite roping in key members of the various women, youth and religious identities to project a representativeness of the main parties, the mobilisation of the votes in the election was predominantly along ethnic

lines. However, the religion identity in this election featured prominently among the Muslim bloc who were split between the Orange Democratic Movement (ODM) and the Party of National Unity (PNU) following the signing of an MoU between National Muslim Leaders Forum (NAMLEF) and Odinga. However, among the Christian flock, the religious identity was not a factor as ethnicity took the centre stage (Oloo 2010). The spread of the Muslims into both ODM and PNU demonstrated that the Muslim religious identity is not homogeneous politically and that despite Najib Balala being hoisted into the helm of the ODM pentagon alongside the MOU with NAMLEF, that did not sway the whole Muslim community behind the party.

The majority of the electorate who voted for Kibaki hailed from Kikuyu, Embu and Meru while Odinga got most of his votes from the Luo, Kalenjin and Luhya as a result of the composition of its top leadership summit referred to as the Pentagon. This was also reflected in the number of parliamentary seats won regionally by the respective parties/coalitions. ODM got the highest number of parliamentary seats in Western (18 out of 24), Nyanza (25 out of 32), and Rift Valley (32 out of 47) while PNU got the highest numbers in Central (18 while the rest [11] went to parties affiliated to PNU) and ODM-K prevailed in Eastern Kambaland where it got 14 of its 15 seats (Oloo 2010).

From the foregoing, it is evident that prior to the 2013 General Election, ideology, and identities of women, youth and religion were drivers of “loss” as opposed to the ethnic identity that had been a driver of “victory” since the return to multiparty elections in Kenya.

The 2013 general election: Drivers of “Victory” and “Loss”

The 2013 general election was a carryover of coalition politics based on ethnicity from the previous two general elections as various ethnic groups coalesced around the two major coalitions that had the potential to win the elections—the Jubilee Coalition by Kenyatta and William Ruto and the Coalition for Reforms and Democracy (CORD) headed by Messrs Odinga, Kalonzo Musyoka and Moses Wetangula. The third coalition was the Amani Coalition headed by Mudavadi, which brought together United Democratic Front (UDF), KANU, and Eugene Wamalwa’s New Ford-Kenya (NFK). Jubilee brought under its umbrella two of the big five ethnic groups—the Kikuyu (under The National Alliance [TNA] and Kalenjin (under the United Republic Party [URP]) blocs. There were also other minority ethnic groups that affiliated with the coalition. On the other hand,

CORD brought under its umbrella the other three of the big five ethnic groups—the Luo and Luhya (ODM), Kamba (Wiper Democratic Movement [WDM]) and Luhya (FORD-K). However, the Luhya were partially split as they had a candidate in Mudavadi of Amani Coalition, who priced away a share of the Luhya vote from CORD.

Table 1: 2013 Presidential election results by region

Region	Kenyatta	%	Odinga	%	Mudavadi	%
Central	1,895,075	93.92	84,010	4.16	4,284	0.21
Coast	158,083	19.34	612,057	74.9	10,564	1.29
Eastern	848,234	46.96	881,455	48.8	12,802	0.71
Nairobi	659,490	46.75	691,156	49	22,061	1.56
North Eastern	175,032	59.58	98,802	33.63	834	0.28
Nyanza	181,961	10.47	1,508,776	86.83	15,257	0.88
Rift Valley	2,188,422	72.22	707,541	23.35	64,295	2.12
Western	66,185	5.45	755,525	62.22	353,864	29.14
Diaspora	951	40.85	1,224	52.58	20	0.86
Total	6,173,433	50.07	5,340,546	43.31	483,981	3.93

Source: Constructed from Independent Electoral Commission of Kenya results

While the 2013 election results reflected the anticipated ethnic voting pattern of the previous elections since the return to multiparty politics, the Luhya vote depicted an intriguing case. For the first time since the return to multiparty politics in 1991, a candidate from the big five ethnic groups failed to deliver the ethnic group vote. Odinga defeated Mudavadi for the Luhya's vote by 62.22 per cent to 29.14 per cent. And even in his own county, Vihiga, Mudavadi (49.19 per cent) barely defeated Odinga (46.44 per cent) by a mere 2.75 percentage points.

There are a number of reasons that can be advanced to explain why Mudavadi failed to win the Luhya vote. One reason is that by the time Mudavadi decamped from ODM (May 2, 2012), the party's tentacles were too entrenched for him to orchestrate a tectonic shift in the region's voting pattern. More importantly, unlike the other big four communities that had a dominant party which their community paid allegiance to, *vide* Kikuyu, the TNA, Luo, the ODM,

Kalenjin, the URP, and Kamba the WDM, Mudavadi’s party, the UDF, was not dominant among the Luhya. In fact, ODM proved to be more popular than UDF among the Luhya. Furthermore, FORD-K and NFK also had a significant presence in Luhyaland, especially among the Bukusu sub-tribe. This is mainly because the two parties have been the mainstay despite their split since the return to multi-partyism.

Second, the dalliance between Jubilee Coalition and Mudavadi prior to the breakdown of his agreement with Kenyatta was depicted as a strategy to lock ODM from Luhyaland, and might have probably, generated sympathetic votes for ODM and protest votes against UDF.

Third, since the 2002 General Election, the electioneering process has always shaped into a two-horse race. In 2002, although Simeon Nyachae’s FORD-P was in the race, the contest was between NARC and KANU. In 2007, although Kalonzo Musyoka’s ODM-K was in the race, the contest was between Kibaki’s PNU and Raila Odinga’s ODM. And, thus, in 2013, after the Jubilee disowned Mudavadi in the short-lived marriage, the contest was essentially between Kenyatta’s Jubilee Coalition and Odinga’s CORD.

The results of the elections again reaffirmed the supremacy of the ethnic identity over ideological orientation and other identities. Kenyatta secured 93.92 per cent, 72.22 per cent and 59.58 per cent of the vote in Central, Rift Valley and North Eastern regions respectively while Odinga secured 86.83 per cent, 74.9 per cent and 62.22 per cent in Nyanza, Coast and Western regions respectively. The impact of running mates as stipulated in the pure presidential system under the 2010 constitution came out much more clearly in the 2013 General Election as it was instrumental in marshalling votes in the regions associates with respective running mates. William Ruto was able to deliver the Rift Valley bloc while Musyoka delivered the Kamba bloc. Unfortunately, the choice of a running mate for Amani Coalition did not matter much as the candidate, Jeremiah Kioni, hailed from a region (Central) which already had a serious presidential contender in the race. The two coalitions shared the spoils in the cosmopolitan Nairobi region as well as the Eastern region where clan-lines determined the voting patterns (see Table 2).

The presidential election results were further replicated in the parliamentary, senatorial and gubernatorial races. In the parliamentary elections, the Jubilee Coalition was able to hold sway in Central, Rift Valley and North Eastern where it garnered 100 per cent, 80.26 per cent and 55.56 per cent respectively.

Table 2: 2013 parliamentary election results by region

Coalition	Coast	North Eastern	Eastern	Central	R.V	Western	Nyanza	Nairobi
Jubilee	5 (19.23 %)	10 (55.56 %)	17 (38.66 %)	33 (100 %)	61 (80.26 %)	2 (6.06 %)	3 (7.14 %)	9 (52.94 %)
CORD	18 (69.23 %)	8 (44.44 %)	23 (52.27 %)	—	7 (9.21 %)	19 (57.58 %)	34 (80.95 %)	8 (47.06 %)
Amani	2 (7.69 %)	—	1 (2.27 %)	—	6 (7.89 %)	11 (33.33 %)	1 (2.38 %)	—
Eagle	1 (3.85 %)	—	—	—	1 (1.32 %)	—	—	—
FORD-P	—	—	1 (2.27 %)	—	—	—	3 (7.14 %)	—
NARC-K	—	—	—	—	—	—	1 (2.38 %)	—
Ind.	—	—	2 (4.55 %)	—	1 (1.32 %)	1 (3.03 %)	—	—

Source: Constructed from Independent Electoral Commission of Kenya results

The results from Central and Rift Valley regions are attributed to the fact that the presidential candidate and his running mate hail from the regions. In the North Eastern region voting was along clan lines with Jubilee defeating CORD by 10 to eight seats in the county. CORD managed to deliver Nyanza, Coast, Western and Eastern regions garnering 80.95 per cent, 69.23 per cent, 57.57 per cent and 52.27 per cent respectively. The significant number of votes garnered in Nyanza, Eastern and Western was accomplished by the fact that the three principals in the party hail from the regions with Odinga's political tentacles also entrenched in Western Kenya. Amani was unable to challenge CORD in Western region despite the head of the coalition, Mudavadi, coming from the region. Amani only held sway in Vihiga County where it won six of the parliamentary seats on contest. Nairobi was almost a tie with Jubilee garnering nine seats while CORD got eight seats after the by-election in Mathare that went in favour of CORD.

Table 3: 2013 gubernatorial election results by region

Coalition	Coast	North Eastern	Eastern	Central	R.V	Western	Nyanza	Nairobi
Jubilee	—	1	4	5	10	—	—	—
CORD	5	2	4	—	3	2	6	—
Amani	1	—	—	—	1	1	—	—
PPK	—	—	—	—	—	1	—	—

Source: Constructed from Independent Electoral Commission of Kenya results

In the senatorial and gubernatorial elections, the same scenario in the presidential and parliamentary elections was replicated. In the Coast Region, where CORD held sway, it won five of the available six positions in both the senatorial and gubernatorial races. In Central Region, where Jubilee held sway, it won all the seats. In Eastern Region, the two parties equally split the seats in both races with each taking four of the eight seats because of the Musyoka/Wiper influence in Kambaland and the Meru/Embu affinity with the Kikuyu. In the Rift Valley Region, Jubilee won 10 of the available 14 seats in both the senatorial and gubernatorial races. In Nyanza, CORD delivered all available seats in both races. In Nairobi, CORD took the gubernatorial seat while Jubilee took the Senate seat.

Table 4: 2013 senatorial election results by region

Coalition	Coast	North Eastern	Eastern	Central	R.V	Western	Nyanza	Nairobi
Jubilee	1	2	4	5	10	—	6	1
CORD	4	1	4	—	2	2	—	—
Amani	—	—	—	—	2	2	—	—
PPK	—	—	—	—	—	—	—	—

Source: Constructed from Independent Electoral Commission of Kenya results

From the above analysis, it is obvious that the ethnic identity has triumphed over both ideology and the youth identity which was again dangled in the 2013 elections. Despite publishing manifestoes detailing the policies the parties' would implement once in power, none of the parties/coalitions campaigned along a distinct ideological front. Identity-wise, despite the Jubilee team pitting the contest to be one between the digital which was projected to embrace the youth versus the analogue (CORD) which was christened the wazees group (old guards), the mode of mobilisation and voting ended up taking the perennial ethnic angle. Ethnicity thus remained the fulcrum around which the politics of the 2013 General Election were crafted around.

Conclusion

This chapter has demonstrated that political mobilisation in Kenya is predominantly shaped by ethnic identity. This has mostly been influenced by the politics of resource distribution since independence which has tended to favor the ethnic group whose member controls the reigns of power. The big five communities have thus come to associate access to state power with the flow of resources to their region and vice-versa.

The salience of ethnicity in political mobilisation in Kenya is context specific. The efforts of parties and their candidates to mobilise the electorate are located geographically and socially within the context of particular structural and institutional settings. Most of the ethnic groups are domiciled in particular regions. The Kikuyu and their kindred are to be found in the Central/Mount Kenya Region, the Luo in the Nyanza Region, the Kalenjin in the Rift Valley Region, the Luhya in the Western Region and the Kamba in the Eastern Region. And more importantly, these areas are associated with particular political parties that are home to the ethnic group that resides therein. In the words of Horowitz, political entrepreneurs that form ethnic parties find "a ready-made clientele ... waiting to be led" (Horowitz 1985). Therefore, under such circumstances it has become only prudent to mobilise these groups along their ethnic lines as that is more of a unifying factor in such a context than would be ideology, religion, youth or gender.

Clearly, mobilisation which has sought to entice the youth, gender or religion identity in Kenya has not excited a lot of passion as much as the ethnic identity since the masses do not perceive these networks as having the capacity to

deliver the pork to them. The reason why the ethnic identity remains salient is because it illuminates a strong sense of common identity among the target population, the strength of social ties between individuals within the target population, and the existence of social networks linking party leaders and potential followers.

Likewise except for the immediate period leading to independence and the immediate post-independence period, political parties are less identified by their ideological leaning which for the most part remains only in name. Infact, any semblance of ideological stint has for pragmatic purposes been conflated on identity politics as each movement, coalition or party comes to the realisation that they need the critical mass as a driver of “victory” and that mere principled ideological positioning becomes a true recipe for “loss” as SDP under Apollo Njonjo and James Orengo attests. It follows then that the trooping of individual politicians with contrasting ideological leanings to FORD, NARC, and ODM before 2013 but whose ethnic identity and following assured the recipient election-eering vehicle of victory has become the order of the day in the Kenyan body politic.

Overall, and in the foreseeable future, it appears that identity will triumph over ideas and ethnicity will remain salient in party mobilisation and membership strategies employed by political parties in Kenya and similarly gender, religion or the youth identity will take a long time to acquire the requisite weight to be contenders as drivers of victory. In the end, individuals “vote their ethnic groups” in the belief that it maximises their ability to access to state resources. The cause of this “ethnicised” voting behaviour is instrumentalised by the political elites from respective communities. The mobilisation strategy and leadership style of the past decades have influenced communities to think that only by having “one of your own” in governmental power can the community access power and patronage. The idea of “one community, one party” is so entrenched that it has to a large extent cornered the very political elite that once ensured it evolved (Hulterström 2007). They are now hostages of their ethnic communities.

It is these ethnic parties that have formed the basis of ethnic pacts and coalitions that have come to inform contemporary politics in the country as opposed to gender, youth or religion, on the one hand, and ideas, issues and ideology on the other. Ethnicity and the pacts arising therein was the “driver of victory” in

the 2013 General Election irrespective of the disputed presidential elections as both Jubilee and CORD owe their massive followings to ethnic pacts while the lack of the same was the “driver of loss” as evidenced by the poor performance of Mudavadi of the Amani coalition, Martha Karua, Paul Muite, Peter Kenneth, James ole Kiyiapi, Mohamed Dida with their respective parties.

This trend of ethnic based identity politics is likely to characterize subsequent presidential elections unless the country legally, attitudinally and behaviorally entrenches institutional and issue based politics in the Kenyan political framework.

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Political Party Organisation in Kenya and the 2013 Elections: What Lessons for Democracy and Inclusion?

FELIX KIRUTHU

Introduction

The Constitution of Kenya was promulgated on August 27, 2010 with a lot of celebration and excitement. This was an expression of Kenyans' expectation that the socio-economic and political trajectory in the country would henceforth change for the better. One of the revolutionary ideas in the Constitution was the creation of two levels of government, namely the national and the county governments. Three years later in March 2013, Kenyans went into elections and cast six ballots for respective political leaders in compliance with the new constitutional dispensation. It is argued here that one year since the last general elections is an opportune time to look back and see how the political parties organised their affairs. This chapter examines not only how political parties organised their affairs in the run up, but also, during the 2013 elections. In particular, the rationale and consequences of this political party organisation is interrogated with a view to providing suggestions on how political parties could be reorganised to be more democratic, inclusive and issue-driven. Given

that democratisation is a complex process, such an assessment is crucial in terms of gauging the gains made by Kenyans in the democratisation process, as well as the pitfalls on the road ahead.

Like most countries in Africa, Kenya is by no means unique in terms of the electoral related challenges since independence. The country has experienced varied levels of electoral violence since 1963 (Consolata 2013). Indeed, in Africa it is not an exaggeration to argue that almost all the countries in the continent have had to contend with the issue of narrow nationalism in almost every general election. This was aptly captured by Mafeje (1998:9) when he observed that the absence of democracy has threatened the integration of the state in countries such as Nigeria, Sierra Leone, Rwanda, Burundi, the Democratic Republic of Congo, Lesotho, Somalia, Algeria, Chad, Sudan, and Kenya.

It is important to note that almost every society is characterised by some form of diversity, whether ethnic, religious or cultural (Mcnee 2013). Diversity inevitably brings a number of challenges for nationals especially in regard to political unity. Nevertheless, political pluralism in the form of multiparty elections also provides a number of positive dynamics in society. For instance, it has opened greater space for political engagement in Kenya since 1991 (Kanyinga 2013). However, it should be pointed out that the way politics has been practised in Kenya has undermined the values of plural society. Rather than enhancing democratic ideals and fostering tolerance and respect for others, political parties have exacerbated ethnic divisions and differences among the people (Ghai & Cottrel 2013:11).

The question of political parties’ organisation in Africa has attracted the scrutiny of many scholars including Mafeje (1997) and Nnoli (1989). However, it is difficult to discuss the issue of party politics in Africa without interrogating the history of various communities as well as the basis of societal organisation, including ethnicity, religious organisation as well as other forms of cultural affinity. These structural arrangements are often at the centre of African political party organisation. According to Ghai (2013), ethnicity is a common consciousness of being a member of one ethnic group, as opposed to another. Thus it entails using ethnic identity to the exclusion of other groups. Mafeje (1997) and Nnoli (1998) have also pointed out that ethnic identity is always dormant until groups of individuals in society begin to compete for resources and power. Political parties, as we will see later, are often used as vehicles to advance the

interests of the political class, who ride on the platform of pro-moting ethnic or sectional interests. This is the phenomena the British historian John Lonsdale refers to as 'political tribalism' (Ghai & Cottrel 2013).

In order to understand the organisation and motives behind Kenyan political parties in the 2013 elections, it is crucial to look back and examine the political developments in the country after the Post-Election Violence in 2007–2008. This is mainly because these tragic events have played a critical role in shaping the politics of the country.

Party politics after 2007–2008 post election violence (PEV)

The 2010 Constitution of Kenya created 47 counties and brought several other far-reaching changes (Mwenda 2010). One of the main drivers of the urgency to pass the Constitution could be traced back to the experience of PEV of 2007–2008. During the 2007 elections, suspicion between different political parties over the role of the Kibaki government in the management of elections was rife. For instance, in the period preceding the 2007 general election, the President unilaterally appointed Electoral Commission of Kenya (ECK) commissioners in total violation of the 1997 Inter-Party Parliamentary Group (IPPG) compromise, which provided that political parties would nominate members to the ECK according to party strength in parliament (Sihanya 2011). Claims of election irregularities in the vote tallying process by the main opposition parties, the foreign observers and domestic observers, especially the civil society, cast doubts on the integrity of the Electoral Commission led by Kivuitu (Cheeseman *et al.* 2013). The announcement by the Electoral Commission on December 30, 2007 that Mwai Kibaki, the incumbent, had won the elections led to a political crisis that provoked an unprecedented wave of political violence and killings across the land. Consequently, a total of 1133 people lost their lives and hundreds of thousands were displaced (CIPEV 2008:346, 352). In addition, property worth millions was destroyed either through acts of arson or looting.

This conflict was resolved after the two main political parties, the Orange Democratic Movement (ODM) and the Party of National Unity (PNU), held negotiations under Kofi Annan, the former UN Secretary General who acted as chief mediator. Consequently, on February 28, 2008, Mwai Kibaki and Raila Odinga signed a power-sharing agreement. The main provisions of the agreement stipulated that a grand coalition government would be established in which the two parties would share power. Executive authority would be divided between the

two main parties, ODM and the PNU. Kibaki was to retain the presidency, while Raila would occupy the newly-created office of the Prime Minister, whose tenure was secured as he could only be removed from office by a vote of no confidence by Parliament (Sihanya 2011). On March 18, 2008, Parliament amended the Constitution and adopted legislation to give legal force to the agreement and on April 17, 2008 the new Coalition Cabinet and Prime Minister Raila Odinga were sworn in. The Kofi Annan-led political settlement also set out a reform agenda to address underlying causes of the PEV. Agenda No 4 of this arrangement specifically called for a new process to finalise the long-awaited Constitution with a view to addressing the long-standing grievances, many of which are believed to have led to the bloody violence in 2007/2008. The saying that constitutions are written during times of crisis holds true in the case of Kenya. After the PEV in 2008, there was great momentum towards finalising the new Constitution.

The 2010 Constitution introduced new structures of government, including devolution (Ghai & Cottrel 2013). The 2013 election was, therefore, revolutionary as it ushered in a radical experience from the past in several ways. First, each voter cast six votes. One was for the president, member of national assembly, woman representative of the county, county governor, senator of the county and finally, member of the county assembly for the local ward. Each constituency has between three and five such members based on population and geographical space (Ghai & Cottrel 2013). Consequently, the 2013 elections saw the expansion of the number of constituencies represented in the national assembly from 210 to 290 (Opalo 2013:71). In addition to the 290 members, the National Assembly also had 47 women representatives elected countrywide from 47 counties.

Organisation of political parties in the 2013 elections

One of the interesting facts about Kenyan politics is that by 2013 elections, the political landscape had changed a lot. As Cheeseman *et al.* (2013) and (Ghai & Cottrel 2013) have observed, the political parties which had taken centre stage in the 2007 had transformed enormously. For instance, the party that had been declared winner of the 2007 elections, PNU, had collapsed by 2013. Similarly, Kalonzo Musyoka's ODM-K had transformed into the Wiper Democratic Movement (WDM). It should be noted that after 2007, ODM-K had established a coalition with the PNU of Mwai Kibaki that saw Kalonzo Musyoka, the Party Leader,

become the Vice-President of Kenya. KANU, the party that ushered Kenya into political independence in 1963, had also become weak by virtue of having lost most of its followers and key leaders to other political parties.

The 2013 presidential elections took place within a new context in several ways (Makulilo 2013). First, it was conducted using a new Constitution, which was expected to resolve some of the critical causes of socio-economic and political cleavages that afflict the society. Second, the election was supervised by a new electoral body, the Independent Election and Boundaries Commission (IEBC), whose members were carefully vetted by Parliament to ensure that they were people of high integrity. Third, the election took place against the background where one of the presidential candidates, Uhuru Kenyatta, and his running mate, William Ruto, were indicted by the International Criminal Court (ICC) in The Hague (Makulilo 2013:13). They were both accused of master-minding the 2007–2008 ethnically targeted violence against each other's communities, which left many people dead and thousands injured and many more displaced from their homes (Mueller 2013). Fourth, the election attracted eight contestants, although eventually it turned out to be a two-horse race between Uhuru Kenyatta and Raila Odinga. An appreciation of this new context is critical in understanding the factors that shaped political party organisation during the 2013 elections.

It has been observed by several analysts that, like in past elections, the voting pattern of the 2013 elections tended to be along ethnic lines and this reflected the organisation of political parties in the country (Ghai & Cottrel 2013; Cheeseman *et al.* 2014). Mutahi Ngunyi, a political analyst, stated this clearly even prior to the election. He described the outcome in terms of “tyranny of numbers” and argued that the election was already lost by the time voter registration ended on 8th December 2012 due to the pattern of registration (Ghai & Cottrel 2013:110). It should be noted that although it was anticipated that more than 21 million Kenyans out of the more than 40 million population would register as voters, ultimately only 14 million registered. Mutahi Ngunyi's analysis pointed out that areas dominated by Uhuru Kenyatta's Kikuyu and William Ruto's Kalenjin communities had registered more than six million voters (*ibid.*). Raila Odinga's areas of core support, on the other hand, registered only 2.5 million and this left the prospects for Uhuru Kenyatta's victory very probable, according to Ngunyi (Ghai & Cottrel 2013:110). This clearly indicated that political mobilisa-

tion was also based on ethnic and sectional interests. In the Jubilee strongholds, for instance, there was intense mobilisation of potential voters by politicians because the stakes were very high compared to other regions in Kenya, as we shall see shortly.

It is important to interrogate the reasons why there was a skewed pattern of voter registration as noted above. The fact that the ODM appeared to have been the most popular party might have led to the party's areas of support not to register as aggressively as in the Kikuyu and Kalenjin areas. A number of opinion polls seemed to confirm that the ODM was on the way to winning the elections. It was only at the eleventh hour, especially after the presidential debates in February 2013, that Synovate Ipsos began to indicate that Uhuru's popularity was on the rise (Makulilo 2013). In addition, as already pointed out, the fact that Uhuru Kenyatta and William Ruto had been indicted by the ICC led the two leaders and their political parties to campaign more aggressively, possibly due to the belief that political support would shield them from the ICC (Mueller 2013). It must be pointed out that their supporters were even urging them not to attend court sessions at The Hague. Moreover, the fact that Sudan's President Omar Al-Bashir had continued to run Sudan in spite of similar indictment by the ICC could have persuaded the supporters of Uhuru Kenyatta and William Ruto that a similar situation could be replicated in Kenya, as long as the two leaders won political power. Once the ICC commenced investigations of the Kenyan situation, the government mobilised support against it both domestically and internationally, advocating for trials to be conducted locally (Mueller 2014:31).

A number of pre-election coalitions took shape among political parties prior to the 2013 elections. The Jubilee Alliance was one of these coalitions and it was designed to unite most of the Kikuyu and Kalenjin peoples through their leaders, Uhuru and Ruto, respectively. Besides other factors, the fact that both leaders faced the same problem in regard to the ICC cases obviously motivated them to work closely in mobilising supporters from their respective ethnic communities. Moreover, the ICC proceedings against these leaders enabled them to create a siege mentality among their supporters (Cheeseman *et al.* 2014). They persuaded their supporters during campaigns that they were victims of both neocolonialism and imperial conspiracy of the United States of America and Western Europe. The comments made by Western envoys and USA to the effect that their countries would only have essential contact with Kenya in the

event that the two leaders would get elected, seemed to confirm this assertion by UhuRuto, as the two were popularly referred (*ibid.*).

Charity Ngilu, a Kamba from Kitui County and former Cabinet Minister in Kibaki's government also joined the Jubilee Alliance. Unlike the other two leaders, Ngilu's motive to join the Alliance appeared to have been informed by the acceptance of her political rival, Kalonzo Musyoka in the Coalition of Reform and Democracy (CORD) Alliance of Raila Odinga. To Ngilu, this was seen as betrayal by the ODM, as previously she had supported the party to the hilt and had been appointed by Raila within the Grand Coalition as the Minister for Water, one of the most powerful ministries.

The CORD Alliance, on the other hand, was designed to unite the Kamba and the Luo as well as sections of the Luhya people of Western Kenya, particularly the Bukusu. This was achieved through forging an alliance of community leaders led by Raila, Kalonzo and Wetangula, and their political parties. Raila brought the ODM into the Coalition, Kalonzo came with his WDP, while Wetangula brought the FORD-Kenya party under the coalition. Another smaller coalition was the Amani Coalition. This comprised Musalia Mudavadi's United Democratic Front (UDF) party which was supported by a good number of Luhya communities from Western Kenya, and two other small parties namely, New Ford-Kenya, led by another Luhya leader from the Bukusu section, Eugene Wamalwa and Kenya African National Union (KANU). It should be pointed out that Mudavadi was a staunch member of the ODM party all the way up to a few months before the 2013 elections, when bad blood developed between him and Raila's supporters in the party. This was after he declared his intention of contesting against Raila for the nomination as the party's presidential candidate. When it became imminent that majority of the Luo leaders in the party were opposed to his candidature, he quit and established the United Democratic Front (UDF). Since his party attracted some of the Luhya members of the ODM, it can be argued that his departure from the ODM further undermined Raila's opportunities for capturing the presidential vote. Mudavadi's supporters interpreted the resistance of mainstream Luo-ODM leadership to Mudavadi's presidential candidature as having been informed not only by tribalism but also intolerance of democratic competition.

It must be noted that one of the factors that undermined party democracy among the dominant political alliances/coalitions such as Jubilee Alliance and the CORD Alliance in 2013, was interference of the party primaries by the leader-

ship. The CORD Alliance appeared to have been more adversely affected by this phenomenon possibly because of the high stakes associated with clinching party nomination, which was understood as a gateway to political success given the wide support of the party in Nyanza and Western Kenya. In Nyanza, such interference cost the ODM party the National Assembly seat for Alego-Usonga, which was won by the Wiper Democratic Movement and three county assembly seats in the same constituency went to Ford Kenya and the National Vision Party (Ghai & Cottrell 2013).

At the Coast, the political landscape was somewhat different from the rest of the country on two accounts. First, the region is inhabited by a large population of Muslims as opposed to a small fraction of the Christian population. Followers of both religions have divergent interests especially on political representation. Secondly, the Coast has since independence experienced some tension between the communities from upcountry settled in the region and the indigenous coastal communities (Willis & Chome 2014). Despite a very serious campaign by the Jubilee Alliance at the Coast, a majority of the residents voted for the CORD Alliance. The distribution of the votes has been attributed to the fact that Kenyatta got support from “upcountry voters” including the Kikuyu in places such as Lamu West, while Raila got the majority of Coastal people’s vote (Willis & Chome 2014:120). Structural issues appear to have been at the centre of determining the voting pattern and the political alliances in the region. Majority of the coastal people were dissatisfied with the modest devolution offered by the 2010 Constitution. Locals wanted a higher threshold of devolution with regard to local control over the ownership of minerals, public sector jobs, land ownership and the port of Mombasa (*ibid.*:121). This could explain why most of the senatorial, gubernatorial and national assembly seats at the Coast were won by political parties in the CORD Alliance.

Inclusivity and democratisation of political parties in Kenya

In contrast with the few political parties in major democracies such as the US or the UK, one of the peculiar characteristics of multiparty politics in Kenya is the high number of political parties. More than 50 political parties contested for various seats in the 2013 elections (Ghai & Cottrell 2013). However, as we have already pointed out, the elections demonstrated that Kenya’s political parties are not grounded in any ideology, but rather are led by individuals who are perceived to represent interests of particular ethnic groups or regions (Makulilo

2013). Indeed, most political parties have been described as vehicles used by leaders for coagulation of particular ethnic support around those individuals. This could explain why some leaders are quick to join one party after another whenever it suits them to decamp.

As we have already seen, decamping from one party to another could also be brought about by other grievances. In 2013, the TNA (The National Alliance Party), the URP (United Republican Party) and the UDF (United Democratic Front), emerged out of such dynamic political interests. This calls for serious efforts to infuse ideological or philosophical bases in political parties. We submit here that such a strategy could undermine the ethnic orientation of political parties and subsequently reorient them to focus on real issues affecting the nation. Johann Kriegler, who chaired the Independent Review Commission, which was established by the Kenyan government in February 2008 to investigate the causes of the PEV, observed that the political parties are used as vehicles for strong men to run their politics along ethnic lines (Mosoku 2014:7). He further observed that one cannot distinguish the principles of the Jubilee Alliance from those of the CORD Coalition in the 2013 elections and concluded that Kenyans still run elections on tribal associations between leaders, but not programmes or principles (*ibid.*:14).

It should be noted that Uhuru Kenyatta was in 2013 campaigning on the ticket of a new political party, the TNA. This meant that he had abandoned KANU, his former political party. Similarly, his running mate, Ruto, also abandoned the ODM Party and established a new political party, the URP. Interestingly, rather than join Uhuru in his TNA party, Ruto chose to establish his own political party. This implied that each candidate mobilised supporters from his region. The TNA and the URP came together in December 2012 when they established the Jubilee Alliance (Cheeseman *et al.* 2014). Support for Jubilee which was led by Uhuru came as a surprise to most observers. The Rift Valley was the worst affected during the post-election violence after the 2007 elections and the communities that were locked in this conflict in the region were mainly the Kikuyu and the Kalenjin. It was, therefore, surprising that these communities were united in the Jubilee Alliance given the history of election-related violence in the Rift Valley, which dates back to the early 1990s during the Moi era (Lynch 2014). Lynch has gone on to argue that the Kikuyu have tended to vote as a bloc in multiparty elections and cast their votes for parties other than those supported by majority Kalenjin with the exception of the 2013 elections (Lynch

2013:95). Apparently the name Jubilee was strategic for a number of reasons, according to Cheeseman *et al.* (2014:7). First, it combined multiple themes, both religious and political. Secondly, it appeared to celebrate Kenya’s fifty years of independence. In this way, the name of the party is likely to have gained traction especially with the youth and hence attracted a substantial number of votes on this account. The name ‘Jubilee’ was therefore crucial in terms of attracting the youth across the nation to the Coalition regardless of ethnic affiliation or religion. The leadership of the Coalition, namely, Uhuru and Ruto, capitalized on the name to contrast the relatively younger leadership of Jubilee to older leaders in the CORD Coalition such as Raila and Kalonzo, who were described as analogue compared to the Jubilee Alliance which was presented as ‘digital’. Ultimately, the name Jubilee promised youth inclusion in the Alliance’s organisation.

It should be pointed out that although the ODM party did not experience as many changes in terms of leadership as the other main political parties in the run up to the 2013 elections, it also underwent a substantial transformation. After the Grand Coalition Government was established and the subsequent securing of the position of Prime Minister by Raila, his main allies in the Pentagon, including Ruto and Najib Balala, fell out with him and accused him of having failed to sufficiently reward them and their communities in spite of having sacrificed a lot to secure votes for the ODM (Cheeseman *et al.* 2014). This, among other things, was to shape the political landscape in Kenya during the 2013 elections. This fallout was an indication of lack of internal conflict resolution mechanism within political parties. It, therefore implies that to enhance strong and vibrant political party culture in the country, mechanisms must be created to foster internal party democracy. This would curtail the repeat of occurrences like those which led to the acrimonious fall out of the former Pentagon members. It should be pointed out that the fall out between Raila and his constitutional affairs adviser, Miguna Miguna, further undermined the ODM leader. In his book, *Peeling Off the Mask*, which was published in 2012, just one year to the elections, Miguna makes negative allegations that painted Raila in bad light. For instance, the author accuses Raila of high handedness in the running of the ODM party and also accuses Party leaders appointed to cabinet during the Grand Coalition Government of having abetted corruption. Such allegations cast doubts even among some of the ODM members on the ability of their Party to steer political leadership of the country, given that Miguna was

among the senior leaders of the Party who had decamped. This further indicates the importance of enhancing conflict resolution mechanisms within political parties.

It is argued here that political parties fielded candidates to contest in different constituencies based on how well they were believed to appeal in ethnic terms to the local community. Opalo (2014) has observed that there was marked regional concentration of party support. With the exception of ODM, all the five major political parties received at least more than two-thirds of their seats in Parliament from constituencies where the majority of residents were of the same ethnicity as the party leader (Opalo 2014:71). Moreover, out of the 59 registered political parties in the country, only 19 won seats in the National Assembly (*ibid.*). Apparently, even the major political parties did not field candidates in their rivals' stronghold regions. ODM did not field candidates for gubernatorial positions in Nyandarua, Kirinyaga, Baringo, Laikipia and Bomet, among other places perceived not to support the Party. This was informed by the fact that these areas were believed to be predominantly Kikuyu and Kalenjin strongholds (Ghai & Cottrel 2013:14). Similarly, the TNA and its affiliated parties did not field gubernatorial candidates in Machakos, Makueni, Vihiga, Busia, and Siaya, among other places. Again, these areas were believed to be predominantly the strongholds of the Wiper Democratic Movement and United Democratic Front (*ibid.*:115). This situation could be averted through the enhancement of the Political Parties Act. This means that the government could, for instance, deregister any political party that lacks a national character. Political scheming by the parties in the run up to 2013 elections demonstrated that political parties suffer from two key weaknesses. First, they fail to recruit members from all parts of the country into the political force, which is one of the functions of a political party. Indeed, this goes counter the Political Parties Act, which requires political parties to have a national character. Secondly, since the parties are not organised around ideological basis, they fail to offer alternative policies (Makulilo 2013:13).

According to Ghai & Cottrel (2013), one of the novelties brought about by the Constitution (2010) is the possibility of competition between political parties within the counties especially in areas where the population is more cosmopolitan. Nevertheless, in some areas, it has been reported that political parties got together and allocated governorship to one ethnic group, position of senator to another group, and the position of women representative to a different group

(Ghai & Cottrel 2013:116). This could possibly explain why in some counties, political seats were widely distributed between the main political parties. On the flip side, such an arrangement ultimately undermines democratic practice and creates bitterness, especially among people who feel disenfranchised due to such political arrangements. As Elischer (2010) observes, the high salience of ethnicity in Kenyan political parties remains one of the greatest burdens to the sustainability of democracy and national cohesion.

Opalo (2014) has noted that there was widespread fragmentation of parties during the 2013 election compared to the 2007 election. He attributes this to the fact that political party coalitions allowed disgruntled primary losers to run on other party tickets as long as they remained loyal to the broader umbrella coalition of the given region's preferred presidential candidate. He argues that this could have been brought about by the increased inter-regional political realignment occasioned by the establishment of the devolved system of government, which localised political competition much more than the case was earlier in the country's political history. This was the case in the Meru counties in Eastern Kenya, where a former Minister, Kiraitu Murungi established his own political party, which captured not only the Meru gubernatorial seat, but also a number of National Assembly seats. Nevertheless, at the presidential vote, the region voted for the Jubilee Alliance.

One positive development that took place in the 2013 elections is the contest for positions in the devolved government. Ethnic balancing was clearly illustrated in the gubernatorial elections and this brought about some level of inclusivity in political parties. Each candidate as a rule was required to run with a deputy governor as the running mate in compliance with the Constitution (2010). In cosmopolitan areas, candidates picked running mates from other major ethnic groups. In Mombasa County, Hassan Joho picked Hazel Katana as his running mate. Whereas Joho is Swahili, Katana is from the Mijikenda community, which is represented by a substantial population in Mombasa County. In Lamu, Governor Timamy Issa Abdalla's (Swahili) running mate was Erick Kinyua Mugo, a Kikuyu. Again, the Kikuyu immigrant population is quite substantial in Lamu County, hence, this political arrangement. In Taita-Taveta, Johnson Mruttu's running mate was Mary Ndiga Kibuka, who is Kamba. In Nakuru, Kinuthia Mbugua who is from the Kikuyu community, picked a Joseph Kibore Rutto from the Kalenjin community. In Nairobi, Evans Kidero who is

Luo, picked Mwangangi Mueke, a Kamba to be his running mate (Ghai & Cottrel 2013). The downside of this ethnic based political arrangement is that political competition is compromised as political positions are allocated on the basis of ethnic or regional balance. Moreover, as Hamasi (2013) observes, the political elite exploit ethnic differences to push their agenda forward and this explains why most Kenyans vote for their co-ethnics represented by party and not the party policy.

Although the above arrangement is prone to a number of pitfalls, including enhancing undemocratic practices given that running mates were picked on the basis of their perceived ability in amassing votes from their communities, on the brighter side, it enabled people from minority groups and women candidates to enhance chances of ascending to political power. Moreover, the fact that the Constitution, which created 47 county governments, enabled Raila's ODM party to capture some gubernatorial and senatorial seats obviously softened the blow of losing the presidential contest substantially (Cheeseman *et al.* 2014:14). While this arrangement was very instrumental in enhancing some sense of inclusion in politics and government, there is need for serious civic education to educate communities, politicians and public servants on the new constitutional dispensation. It is apparent that even among those elected to powerful positions such as governors, senators, members of parliament and members of county assemblies, there are many who do not understand the constitutional responsibilities and latitude of their offices. This could explain the bickering experienced between the various officeholders during and immediately after the 2013 elections.

Similarly, the balancing of ethnic interests was witnessed in the presidential contest. Uhuru's running mate was Ruto. While Uhuru is Kikuyu, Ruto is from the Kalenjin community. On the other hand, Odinga, who is Luo, picked Kalonzo, a Kamba, as his running mate. Martha Karua from the Kikuyu community picked Augustine Lotodo, a Kalenjin from the Pokot community in the Rift Valley. This means that political parties' leadership calculated chances of securing political power largely in ethnic terms. This could explain the voting patterns, particularly in presidential elections. Politicians who were seen as community leaders were able to attract a large following especially if they forged an alliance that promised office and other benefits for their people (Ghai & Cottrel 2013:117). While ethnic calculation is important, the fact that candidates were forced to enter into electoral alliance with parties affiliated to other

communities, potentially boosted opportunities for forging genuine alliances and cooperation across ethnic groups. Unfortunately, such alliances are usually very unstable during elections and have continued to be unstable since.

Pragmatism was noted in the 2013 elections. This is well illustrated by a number of factors. First, three Kenyans of Asian extraction were elected to the National Assembly in spite of the fact that they contested in areas dominated by African communities. These are: Shakeel Shabir, once the mayor of Kisumu, who was elected on an ODM ticket. Another one is Irshad Sumra (ODM), who was elected in Embakasi. Finally, Abdul Rahim Dawood (Alliance Party of Kenya—APK) was elected to represent South Imenti Constituency in Meru. Kenyan voters are therefore very pragmatic in spite of the ethnic factor in politics. This trend should be enhanced in order to promote democracy and inclusivity in Kenyan politics. Additionally, the 2013 elections also saw Kenyans vote for a number of independent candidates, particularly for the National Assembly and ward seats. One of the independent candidates was an athlete, an international marathoner. Indeed, Cheeseman *et al.* (2014) have observed correctly that the 2013 elections provided opportunity for the entry of many first-time candidates to be elected into office and therefore expanded the scope of democracy in the country. Independent candidature provides opportunity for political contestants who may be elbowed out of party politics by virtue of coming from a minority community or due to other factors that prevent them from competing with other candidates effectively.

Conclusion

From the foregoing, it is clear that political party organisation during the 2013 elections was quite dynamic, possibly in response to the new political dispensation in the light of the Constitution of Kenya (2010), and partly due to other emerging political developments. The creation of party alliances or coalitions characterised political party organisation across the country. It is suggested here that such coalitions could be enhanced further to entrench not only ethnic and racial diversity in political party membership, but also more inclusion in party organisation. As we have already observed, all the political party coalitions had a presidential contender and a running mate from different ethnic communities. For example, while in Jubilee the main partners were the TNA and the URP, in CORD the main partners were the ODM and the WDM. Given that these political parties represented several ethnic communities, such party organisation

provides a great opportunity to enhance inclusion of the majority of citizens in political parties. Smaller political parties like KANU and the Democratic Party, among others, could be strengthened by forging political alignments with other bigger political parties.

The 2013 elections also demonstrated the advantages that accrue from more inclusion in regard to gender and youth representation in party organisation. This is something that should further be enhanced in compliance with the Political Parties Act, which requires political parties to reflect membership representation from across the entire nation. The youth constitute a huge fraction of the Kenyan population and therefore their participation in the political organisation in the country should not be taken for granted. Political parties should also establish internal conflict resolution mechanisms to guard against frequent splintering of their supporters. This could be done through civic education as well through enhancement of internal party democracy. It has been observed that the fall out of Miguna with Raila, for instance, may have cost the ODM party a lot of votes. Similarly, contestants who felt short-changed at the primaries also ended up joining competing political parties.

Finally, it is further suggested that one of the radical ways of ensuring that all Kenyan citizens have access to political leadership of the country is to encourage political parties to mobilize the citizenry in all corners of the country. The Kenyans of Asian extraction who managed to capture electoral seats in different parts of the country in the 2013 elections are a clear testimony of the benefits of such party mobilisation of the diverse population.

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Political Parties and Coalition Politics in Kenyan General Election(s): The 2013 Presidential and General Elections

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Introduction

How and why do political parties enter into alliances or form coalitions during general elections in Kenya? What are the issues they consider when forming, or seeking to form, such alliances and coalitions? To what extent are such alliances based on policies that can indicate what kind of political, social and economic order such alliances seek to establish once they get state power or form government? These are cardinal questions that need to be posed in an attempt to understand a growing phenomenon in electoral politics in the country over the last decade, and a phenomenon which is likely to shape the nature of forming governments in the future if and when political parties become more stabilised.

An associated question has been asked regarding why Kenyan political parties are not ideological. Quite often, those who hold that these parties are non-ideological do not go further to state what they mean by “ideological,” or what ideology they expect the political parties to espouse. Simply put, an ideology is a clearly formulated world view that, in politics at least, seeks to organise society along certain preferred values so as to impact social relations in specific ways.² Hence an ideology that a political party upholds will inform the manner in which it uses state power when governing. Almost all independence

political parties, from the Convention People's Party (CPP) in Ghana to the Kenya African National Union (KANU) in Kenya espoused the ideology of *nationalism*. It was this ideology that provided the political and social fuel for mass mobilisation to "win" independence and gave the basis for the policies of Africanising post-colonial economies after independence. Fused with nationalism was the ideology of *African Socialism*, very clearly argued in several treatises, policy documents and biographies of its proponents like Kwame Nkrumah,³ Leopold Sedar Senghor,⁴ Julius Nyerere⁵ and Tom Mboya,⁶ to mention but a few.

Further the concept of *ideology* in the Kenyan context is at times invoked to refer to one of the global "*isms*" that emerged from European political economy of the eighteenth, nineteenth and twentieth century and influenced developments and revolutions elsewhere. These are socialism, capitalism and communism. But there are other equally powerful ideologies that emerged from the Industrial Revolution, *liberalism* in particular, and much later *social democracy*. In many ways these ideologies have found some place in the thinking of Kenyan politicians and in the manifestos of political parties without necessarily providing *the dominant and hegemonic policy foundation* in such parties. Thus the National Rainbow Coalition's (NARC) manifesto of 2002 entitled *Democracy and Popular Empowerment* had strong doses of social democratic values that informed the party's championing of universal social health insurance once it ascended to power. NARC's blueprint for economic and social development entitled *Economic Recovery Strategy for Wealth and Employment Creation: 2003–2007*,⁷ while remaining filial to economic liberalism, had some strong streaks of social democracy in its social and economic programmes such as free primary school education and State subsidy for farmers in reviving agricultural production. It is only the Social Democratic Party (SDP) of 1996–2001 that had an open and avowed social democratic profile in policy and ideals.⁸ But it never played a key role in any government as a party and never survived the ethnic dictates of presidential elections in Kenya after 1997.

The other frequent critique of political parties in Kenya is that they are personality-oriented and ethnically-based, and hence are not political parties "properly so-called." The assumption here is that only policies and ideologies are acceptable, or somehow legitimate, in forming political parties. This may be the rhetoric and not necessarily the true story. The story may very well be that behind the personalities and ethnic identities are interests that coincide with other social relations and identities, relations and identities that cannot be

pursued without framing them ideologically and pursuing them under certain policies, regardless of how one may disagree with them from a given ideological perspective. Indeed, pursuing some ethnic or regional interest may not necessarily be always antithetical to a consistent body of progressive ideas; but it may also coincide with a very retrogressive or inhumane idea which is itself ideological in its own way. For example, individual politicians or leaders may represent and articulate certain ideological positions that seek to promote class interests without necessarily relying entirely on *that* class as the only base of support. Forming governments through competitive democratic elections require majorities. And majorities may be harnessed by strong personalities using ethnic, class, region or religious affiliations. We need, therefore, to go beyond looking at how political parties seek to form majorities through coalitions and alliances and establish the interests and goals such alliances and coalitions seek to serve. Therein we may find the secret as to whether such alliances are based on policies and/or driven by certain ideological concerns. But it is also possible that apart from mobilising majorities and getting into power, political parties and their leaders may not have any idea on how to use such State power, in which case to charge such parties of being clueless, policy-deficient and bereft of ideology, may be valid. To qualify as *political parties* with the legitimacy to form *coalitions* to govern, they need not necessarily have discernible ideologies.

Political parties: An overview

A political party is essentially an organised group of people who come together to pursue the goal of capturing state power through an insurrection, a revolution or an election to organise and run society in a specific way. This specific way is often defined in terms of ideologies, programmes and policies that are based on the interests of the members (and supporters) of the party—or at times just the interests of the leaders⁹—and the direction towards which they want society to develop.¹⁰ If along the road of seeking to capture State power a party finds that it cannot command enough support in society to do so, it will most likely seek to ally with other groups or parties to achieve the objective. When political parties do so, they form what are called alliances or coalitions. A government formed out of such marriages among political parties is called a coalition government. Such governments can be the products of insurrections, revolutions or competitive democratic elections. But political parties can within themselves be coalitions of diverse interests and social forces.

Thus I have argued elsewhere that the Kenya African National Union (KANU), the party that formed the first independent government in 1963, was itself a *nationalist coalition* of diverse social interests and forces that were all interested in the independence project.¹¹ KANU gained majority seats in the Senate and the National Assembly to form the government. But being essentially a coalition of factions based on nationalism as an ideology, ethnic interests and economic interests, the party could only retain power and rule effectively by keeping the interests of these various factions satisfied over time. Sooner rather than later, factionalism became the undoing of the staying power of KANU and the need to unravel and undo the nationalist coalition that propelled it to power, creating room for a presidential authoritarian regime very similar to what Karl Marx once referred to as Bonapartism.¹²

James Madison, as early as November 1787, pointed out the discrepancy between the assumptions about majority parties in government serving the public good and their tendency to get consumed in factional fights with little regard to the public good. In other words, there is a difference between the rhetoric of democracy as majority rule and the real world of democracy as factional fights among elites which may very often have little to do with the public interest. In *Federalist Paper No. 10*, Madison wrote the following: “*Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of and the rights of the minor party, but the superior force of an interested and overbearing majority.*”¹³

These complaints are as valid today as they were then at the dawn of the world's most admired liberal democratic polity: the United States of America. Hence it is no wonder that when it came to looking for a political system that would serve the public good in between the two catastrophic World Wars, the model of the Bolshevik Communist Revolution in Russia became popular in Third World political movements against the injustices of the capitalist system. In Africa, where communism was held in suspicion, *one-party democracy* became the preferred system of government, and extensive political treatises were written in its defence. President Julius Nyerere¹⁴ was very skeptical of the political party systems in liberal democracy and the unnecessary, even wasteful, factionalism that they encouraged: hence his advocacy of one-party democracy.

The assumption that the party became synonymous with the state in African one-party states, or died to leave the state to run politics, is only true to some extent in specific cases like Kenya. In Tanzania, this was not necessarily the case: under both the Tanganyika African National Union (TANU) and its successor Chama Cha Mapinduzi (CCM), the party remained an organisation on its own dedicated to organising its common affairs within the state.¹⁵ The fact that President Nyerere was aware that building socialism and democratic governance needed leaders who were consciously trained and prepared, he strengthened the party as the institution within which such leaders were to be nurtured.¹⁶ The relationship between the State and the party subsequently had a substantial bearing on the process of democratisation after 1989, explaining the differences observed between Kenya and Tanzania in this regard. In Tanzania, the party kept on renewing itself so as to organise and run state power. In Kenya, the State submerged the party and only resurrected it at election time to give legitimacy to State power. The one-party system in Kenya destroyed the art of organising political parties altogether. In Tanzania, this art remained the preserve of the ruling party which perfected the art of statecraft at the same time. Rather than pursue the construction of socialism and democracy with this powerful party machinery, Issa Shivji documented how the party elite in Tanzania used this machinery for accumulating both power and wealth to themselves, eventually discarding any pretences at the pursuit of both democracy and socialism. They nonetheless continued to organise competitive electoral politics within the ruling party in forming government essentially to legitimize their political domination of society.¹⁷ In Kenya, the force that organised such elections during the Moi regime to legitimise political domination was not really the ruling party but the President using the administrative apparatus of the State.

Lessons learnt by the opposition from the 2002 and 2007 general elections

In 2002 Opposition political parties formed a broad-based coalition of various parties, factions and interest groups that managed to defeat KANU at the elections. As a party, KANU was not very well organised, but it had the presidency and access to State power, the electoral commission and material resources, which it had used successfully at previous elections to defeat the Opposition. Further, in 1992 and 1997, the opposition political parties did not fully appreciate that the electoral laws did not favour them and they could not win the elections as separate entities. The law provided that the party which wins the majority

seats in Parliament and the presidential candidate who wins the majority votes, would form the government by simple majority. In both elections, although both the President and his party KANU won fewer votes than all the Opposition political parties put together, the electoral law made it possible for Moi to win the presidency and KANU to win majority seats in Parliament.

Unable to change the laws before the elections, the Opposition parties in 2002, after protracted and long negotiations, formed a coalition that was big enough to defeat KANU. Indeed, KANU itself disintegrated just before the elections following President Moi's choice of Uhuru Kenyatta as the party's presidential candidate. The Rainbow Alliance, formed essentially by KANU leaders who felt slighted by Moi's choice of Uhuru as the party's flag bearer, broke away to ally with the National Alliance Party of Kenya (NAK)—an alliance of Opposition parties—to form the National Rainbow Coalition (NARC) on the basis of a Memorandum of Understanding (MOU) between the two. The MOU stipulated how power would be shared between the two coalition partners after the elections. But this was not to be: Mwai Kibaki formed his government essentially on the prerogative given to him by the Republican Constitution and not on the gentlemen's agreement stipulated in the MOU.

The State in single-party *illiberal*¹⁸ societies is regarded by the elite as an important avenue for upward mobility, both for social status and economic gain. Those the elite represent see it in the same light as well, especially since political elites are seen as instrumental in the politics of distribution (“sharing the national cake”) when they acquire State power. Since the State holds many keys to social and economic advancement, entry into State institutions and controlling State power becomes a desperate struggle among the political elite. The ideology of state entrism, therefore, drives electoral competition and determines how and when factions, parties and individuals coalesce in competitive politics. Thus when President Kibaki reneged on the MOU, the Rainbow Alliance leaders saw themselves as essentially being left out of State power, hence losing possibilities of social and economic upward mobility. The powerful elites within NAK (the so-called Mount Kenya Mafia), however, saw this as an opportunity to dismantle NARC altogether, thereby resorting to the use of State power through the authoritarian presidency without the intermediation of a party they did not control.¹⁹ NARC had been useful to them as a “bus” for entering State power: the authoritarian presidency was now the elevator that could lift them to the higher levels of economic and social status they were in search of.²⁰

It was the rules of the election game and the formation of government, enshrined in the Constitution and the electoral laws, that made it impossible for the Rainbow Alliance on its own to enter and control State power in 2002. The same applied to the National Alliance Party of Kenya (NAK). Forming a coalition government that would respect the interest of all its constituent parts with the good will of an individual—the President—was not enough. Rules needed to be institutionalised. Hence soon after the debacle of the MOU, the forces that came together in the Rainbow Alliance now focused on changing the fundamental rules of the game—constitutional reform—to be able to have a better electoral framework for forming government through competitive elections at subsequent elections.

The presidential and general elections of 2007, carried out without constitutional reforms and changes in electoral laws, gave the presidency sufficient powers to manipulate the electoral process and subvert the holding of free and fair elections. State institutions, including the Electoral Commission of Kenya (ECK), would not have mismanaged the elections the way they did without the knowledge and/or complicity of the Presidency. While the voting process itself proceeded very peacefully, irregularities only started emerging in the counting, collating and announcing of the votes: activities which were in the hands of both the ECK as well as the security and administrative institutions of the State.²¹ Hence when the Opposition political party, the Orange Democratic Movement (ODM) cried foul and claimed rigging of the elections, it was the State which was in the dock. The management of the elections, as stipulated in the Constitution and the electoral laws, was the responsibility of the State whose chief executive was the President, an interested party in the results. The disputed results occasioned a major mass revolt which degenerated into violence, mayhem and gross abuses of human rights from both sides of the political divide. Had it not been for the decisive intervention of the African and International Community, the Kenyan society and political system would have collapsed into what has now been called a “failed state.”²² Fortunately it did not. A rapprochement worked out between the two contending parties in January-February 2008 by Kofi Annan and the African team of elder statesmen crafted a Grand Coalition Government that was to rule for five years executing a reform agenda contained in the National Accord. Mwai Kibaki, as leader of the Party of National Unity (PNU) became the President and Raila Amollo Odinga, as party leader of the ODM became the Prime Minister. They were to be co-equals in government, a for-

mula that did not always work as such in practice, notwithstanding its being enshrined in the Constitution.

The electoral reforms recommended by the Kriegler Commission²³ after the 2007/08 crisis included the establishment of an Independent Election and Boundaries Commission (IEBC) presumably divorced from the control by the State, including the Presidency. The Kriegler recommendations were incorporated into the 2010 Constitution which included four key provisions affecting electoral rules of the game with regard to coalition politics. First, for a person to win the presidential vote, he/she needed to get 50+1 per cent of the votes plus a majority in half of the counties, thereby ruling out a minority President like Moi in 1992 and 1997. Two, political parties could legally form coalitions before and after the elections, provided the instruments of coalition were deposited with the Registrar of Political Parties at some stipulated time. Three, membership and chairmanship of the IEBC would be determined by Parliament, with the President only retaining the power to appoint after parliamentary approval of the names. Four, in the event of a dispute over presidential, parliamentary or county elections, an independent Judiciary would settle such disputes to the satisfaction of all parties concerned. It was assumed that the Judiciary would have been reformed sufficiently to be able to play this role.

The political party coalitions in 2012/2013

During the course of the Grand Coalition Government factions emerged in government and new alliances started to form. The ODM, an alliance of political leaders coming from six main provinces (Nyanza, Western, Rift Valley, Coast, North Eastern and Nairobi), created a party structure that accommodated all the provincial—and hence ethnic—interests within the party leadership. However, this did not necessarily satisfy the interests of certain leaders, particularly William Ruto. Though he was one of the two deputies (the other one was Wycliffe Musalia Mudavadi, a Luhya from Western Province) to the Party Leader and Minister for Agriculture, he felt that the ODM Party Leader, as Prime Minister, had left some of his close lieutenants out of the Cabinet. This misgiving subsequently provided one of the grounds for Ruto to quit ODM.

In its election manifesto for the 2013 general elections,²⁴ ODM had singled out four important issues: first, reforming institutions of governance and the political empowerment of the people by ensuring the implementation of the Constitution, particularly devolution; second, ensuring economic stability and

growth by infrastructure development, job creation (particularly through value addition to agricultural produce and other raw materials), fight against corruption and environmental control and the use of green energy; third, promoting equity and social protection by guaranteeing universal access to healthcare, ensuring universal quality education and improving access to water and proper sanitation; and finally, land reform. The usual concern with regional integration, a forward-looking foreign policy and respect for international treaties had always been a common feature of the ODM manifesto since the 2007 elections.

There had been growing concern since the NARC government (in which some leaders in ODM, including the Prime Minister, had served) regarding deforestation and its effect on water resources and climate change.²⁵ Kenya's water towers in the Mount Kenya region and the Mau forest were major culprits in this. The Coalition Government, therefore, decided to reverse the deforestation process in both areas. While the initiative in Mount Kenya and the Aberdares had gone on reasonably successfully since the NARC government, initiating reforestation in the Mau forest by relocating squatters from there became a problem. Having been initiated by the Prime Minister and ODM Party Leader, Ruto—his deputy—was totally opposed to this initiative. His disagreement was at times based on the methods being used and at others on the need to retain the use of the forest to its “ancestral owners.” Notwithstanding several meetings held by the party organs to iron out these differences, and despite the fact that there was hardly any disagreement regarding the party policy position on this, Ruto still led a group of leaders from the Rift Valley to oppose the relocation of the squatters from Mau forest. In the end, it is the disagreement over the Mau that led the Prime Minister to remove him from the Cabinet, giving him the justification to create a strong faction in the ODM that finally broke away to form his own party, the United Republican Party (URP), with a strong Rift Valley following. The same Cabinet reshuffle affected Najib Balala who also quit ODM to eventually become an ally of Uhuru Kenyatta in the Jubilee Alliance.

Behind all this was the desire by Ruto to position himself as a presidential candidate in the 2013 elections. In this regard, he needed a strong political party that he controlled and that he could use with himself as the candidate or in a coalition with another party as the Constitution now provided. Since substantial executive power still lay in the presidency even under the new Constitution, this was the position that was perceived to be critical in controlling instruments of state power. But Ruto had another pressing need to get to the centre of State

power: his case at the International Criminal Court (ICC). He shared this predicament with Uhuru (leading the National Alliance Party-TNA, with a strong following from Central Kenya) who was then a minister in the Grand Coalition Government and a close associate of President Kibaki. As Susanne Mueller has noted, Uhuru and Ruto understood that political power mattered and acted to win it, capitalising on their ethnic identity with the Kikuyu and Kalenjin respectively to craft a coalition that they called the Jubilee Alliance. Winning the election was part of a key defence strategy to undercut the ICC by seizing political power, flexing it to deflect the ICC, and opening up the possibility of not showing up for the trial *if all else failed*. In carrying out their political campaign they targeted Raila Odinga, the leader of their rival Coalition for Reform and Democracy (CORD), and a Luo with strong credentials in the reform movement, as having been responsible for their ICC predicament to eliminate them as political opponents.²⁶

Mueller has described the Jubilee Alliance as *an opportunistic alliance of convenience* as the ICC had accused both individuals of masterminding the 2007–08 ethnically targeted violence against each other's communities. While Ruto was leading the URP elite that appeared anxious to enter State power and initiate the process of accumulation, Uhuru represented an old established elite that had used the State to accumulate capital since the days of Jomo Kenyatta.²⁷ With vast wealth in land, real estate, finance and industrial capital, the TNA elite was obviously better endowed to control state power than their URP counterparts in the Jubilee Alliance under an essentially presidential system. There has also emerged a new and younger elite in real estate, finance capital and commerce that straddles between business and politics, and that uses both economic and ethnic ties to the old elite in support of the Uhuru presidency. Another element of the TNA alliance is the "securocrats": the elite in the armed forces engaged in business with the civilian elite and deriving their source of accumulation in major state defense contracts (<http://foreignpolicy.com/2014/06/06/why-are-africas-militaries-so-disappointingly-bad/>). The TNA/URP alliance was, by its very nature, an alliance of "unequals" bound to suffer the strains of how each side sees the end and outcome of state power. On the one hand is Uhuru Kenyatta, the titular head of a political and economic dynasty, for a long time wedded to the State, and supported by a coterie of economic potentates incapable of cutting the umbilical cords tying them to State power as a guarantee of their wealth and social standing. On the other hand is William Ruto, a

nouveau riche who appears to be in a hurry to build control and influence within the state, using it to accelerate the process of accumulation that can match and/or outdo the Kenyattas. Yet the five-year time period creates a limit, and undue pressure, to such a scheme. At such a time voters in the countryside may easily become mere numbers needed to get into power in the first place; the policies to be pursued while in power in the interest of voters take a secondary position, if any at all. And that is why the public usually become skeptical about party manifestos. Yet the skepticism needs to be audited by the concrete policies and programmes pursued by a party while in power. The tension between the pursuit of private interest of leaders when in power and their public commitment to fulfill manifesto promises is real and concrete, whatever party or coalition of parties form government from time to time.

ODM has been described as “the successor of a former people’s movement which was formed in the 2005 Kenya constitutional referendum” in which it spearheaded the defeat of a draft favoured by Kibaki’s government in preference to an earlier draft by a people’s convention held at the Bomas of Kenya in Nairobi.²⁸ But the ODM, as it was in October 2005, is very different from the ODM of 2013 onwards as an ally of Wiper Democratic Party and FORD-Kenya. The ODM that led the drive to defeat the Wako constitutional draft crafted in Kilifi was composed of the LDP, KANU and an amalgam of civil society organisations committed to the Bomas draft Constitution. Just before the 2007 elections, KANU led by Uhuru Kenyatta, left ODM as did the then ODM-Kenya led by Kalonzo Musyoka. During the life of the Grand Coalition government in which the ODM, KANU, PNU and ODM-Kenya were all partners, new alliances started to emerge as discussed above, affecting the subsequent membership and support of all the four parties. Once it was clear that an alliance that came to be known as Jubilee was in the offing by the beginning of 2012, the ODM leadership started to search for allies among other political parties. The search was a conscious and deliberate action based on the need to put together a winning coalition at a general and presidential election. In the end the ODM found partnership with Wiper Democratic Party and FORD Kenya to form the Coalition for Reform and Democracy, CORD. Ten or more minor parties also joined CORD, but their significance and participation did not survive after the elections when CORD failed to form the government. This was evidence of the fact that leaders of such parties join pre-election coalitions anticipating entry into government subsequent to such coalitions winning elections. They equally tend to depart to join the

opposing coalition in the event that the latter wins the elections. Of the 10 small political parties which joined the CORD before the elections, only one stayed after the elections.

The United Democratic Front (UDF), on whose ticket Musalia Mudavadi ran as a presidential candidate, turned out to be an insurance scheme by the Jubilee Coalition as a “provider” of a more marketable presidential candidate. This scheme aborted at the last moment leaving Mudavadi with an awkward choice of either giving up running for the presidency altogether, or running without the support of the Jubilee Coalition. In the end he seemed to have accomplished an ingenious feat: he ran as a UDF presidential candidate but with the support of the Jubilee Coalition so that he “would eat into” an essentially CORD “vote bank” in the former Western Province.

Conclusion

Coalitions are formed by political parties to get majorities to form government following competitive elections in democratic political systems. Majorities can be created. Political leaders usually look and seek out interest groups, movements, organisations and associations as well as influential individuals to be part of their political parties or to ally or coalesce with their parties in order to create a winning majority at elections. Such groups, including ethnic communities, do not wake up one morning and begin looking for other ethnic communities with which to form alliances: the leaders, assuming they represent such communities, are the architects of such alliances. Such alliances can be formed on the basis of certain policies or ideologies *manufactured* by the leaders. Here we do not use the word manufacture in a derogatory sense; we use it in the sense of creation with a specific purpose. The purpose here is to mobilise people to take an action that produces results in the interest of members—or those who come to together to take such an action: in this regard the voters.

In the case of coalitions that have arisen among political parties in Kenya, the mobilising ideology has usually been based on *distributive politics* in the use of State power. The presidential authoritarian system, in existence since independence, has tended to situate the focal point of distributive politics in the presidency: hence the need for parties to coalesce to win majority to capture the presidency. When it is unlikely that the vote may not win the majority for incumbent presidents and their coalition partners, the fear of losing elections creates temptations to use coercion to determine the win. Hence votes may be

cast but not counted; they may be counted but not announced in favour of the winner; or the results may even be announced but not respected.

The ideologies or ideas that mobilise people to join parties or form coalitions can be progressive or retrogressive; inclusive or exclusive; democratic or even fascist; parochial or universal. The superiority of the Aryan race informed Nazi ideology in Germany, asserting that this was the race that needed to come together to lead Germany and Europe to prosperity. In pursuit of this ideology, Adolf Hitler led Germany to the Second World War against those who resisted this ideology in Germany and the rest of the world. But it must be noted that fascism, though anti-democratic, won the majority in Germany and elected Hitler the Chancellor in 1933. Hence even retrogressive ideologies, like tribalism, can create majorities to win competitive elections in presumably democratic societies.

The Jubilee coalition successfully mobilised followers around the ICC issue in the 2013 elections. Two ethnic communities were thus mobilised to vote and win elections so that a government could come into power to resist the encroachment of the ICC into Kenya's sovereignty. The leaders pitted their opposing coalition (CORD) and its leadership as partisan to the ICC, hence anti-patriotic. Political rhetoric need not coincide with the real story in political contests among political parties as they seek votes. The rhetoric is used to persuade voters and potential voters that they tend to benefit by supporting those who appeal to them using such rhetoric and lose if they do otherwise. Creating the active desire and thirst for benefits and gains following success in elections is what makes voters vote for this or that party or candidate. When a party or a coalition of parties wins elections, it is the desire to ensure that the government survives its term and wins the next elections that usually determines what kind of policies and issues they follow and implement. The Jubilee government has emphasised its commitment to implement its election manifesto, some of which have attracted public attention when not implemented as announced. The extent to which these policies are actually implemented will depend on Jubilee's perception on what will determine the survival of the government and winning the next elections.

But parties may form coalitions to win elections and still not win; in which case they can persist and prepare for the next elections, or they may even disintegrate as their constituent parts seek other alliances. Equally parties may win

elections but not succeed to form government because the incumbent government fails to hand over power. This may be due to the fact that incumbent governments that fail to accept loss of elections use the armed instruments of the state to stay in power.

Democratic elections whose results are respected assume that the civil service, including the armed instruments of the state, plays a neutral role in elections. The term “civil” has always been used to mean professional, technocratic, neutral in politics and able to arbitrate fairly in political conflicts. The military in liberal democratic political systems is always also assumed to be “of government but not in government”; it is, as it were, *the silent listener to every conversation and the silent visitor at every meal*. In advanced capitalist countries like the USA, although the military is indeed part of the “military-industrial complex”, it is strictly not part and parcel of “the power elite” in electoral politics.²⁹ In Kenya, however, the military—and other armed instruments of the state—is part of the power elite and has increasingly integrated itself into the ruling class through close ethnic and business connections with powerful political elites that emerged during the KANU regimes since independence. It is inconceivable that an election whose outcome threatens this *elite compact* can be tolerated by the army elite; hence the presence of the military during election counting and announcing in 2007/8 as well as 2013.

Notes

1 Previously he had served as the Chairman of the National Political Bureau of the Social Democratic Party (SDP).

2 In societies divided into classes, ideas may play an important role in articulating aims and interests of different social classes. Such ideas and interests are quite often organized into coherent arguments presented as the preferable world-view that, when used as the basis for the authoritative allocation of values by the state, is "good for everybody." These ideas are what Marxists refer to as ideologies. They shape the ways in which individuals perceive the social world and their positions within it, thereby affecting the course of social and political change. See John B. Thompson, "Ideology" in Joel Krieger (ed.) *The Oxford Companion to Politics of the World* (Oxford: Oxford University Press, 1993):409–410.

3 Kwame Nkrumah (1967) *African Socialism Revisited* (Prague: Peace and Socialism Publishers)

4 Leopold Sedar Senghor (1963) "Negritude and African Socialism," *African Affairs* 2:9–22.

5 Julius Nyerere (1967) *Ujamaa: The Basis of African Socialism*, (Oxford: Oxford University Press).

6 Tom Mboya (1965) *African Socialism and Its Application to Planning in Kenya* (Nairobi: Government Printers) Although this was a government document, it was closely associated to Mboya's social engineering as the Planning Minister and Secretary General of the ruling party, the Kenya African National Union (KANU). After Mboya's assassination in July 1969, not much was heard of African Socialism in KANU circles after that.

7 Ministry of Planning and National Development (2003) *Economic Recovery Strategy for Wealth and Employment Creation*. Nairobi: Government Printers.

8 Anyang' Nyong'o, P. et al (1996) *Politics of Poverty and Basic Needs*. (Nairobi: SDP Publications).

9 Roberto Michels, the Italian sociologist, was of the strong opinion that political parties, like any other organizations, are essentially run by leaders who determine policies, directions and what parties do. Members are just followers who take their queue from leaders. He called this *the iron law of oligarchy*. "Who says organization says oligarchy," he asserted. *The Iron Law of Oligarchy* was presented in his book *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (London: Hearst's International Library, 1915).

10 Kay Lawson defines political parties as "political organizations that nominate candidates for public office under their own names...They play key roles in organizing the politics of the world, yet are rarely official government organizations. They take different forms under different kinds of regimes, and their degree of importance varies greatly, from nation to nation, from party to party, and from time to time" See Kay Lawson, "Political Parties and Party Competition," in J. Krieger (ed.), *The Oxford Companion to Politics of the World*. Oxford: Oxford University Press, 1993:722–727.

11 P. Anyang' Nyong'o (1989) "The Disintegration of the nationalist Coalition and the Rise of Presidential Authoritarianism in Kenya," *African Affairs*, vol. 88:229–251

12 For a discussion of political Bonapartism as a form of presidential authoritarianism, see Karl Marx (1852) *The Eighteenth Brumaire of Louis Bonaparte* (New York: Monthly Review Press).

13 James Madison (1787) "Federalist Paper No. 10, The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection (continued)," *Daily Advertiser*, Thursday Nov. 27.

14 See, for example, Julius K. Nyerere (1967) *Democracy and the Party System* (Dar es Salaam: Oxford University Press).

15 See, for example, William Tordoff (1967) "Tanzania: Democracy and the One-Party State," *Government and Opposition: An International Journal of Comparative Politics*, Vol. 2, Issue 2: pp. 599–614.

16 The two documents, *The Arusha Declaration and the Mwongozo* (leadership code) are important in this regard.

17 Issa Shivji (1973) *Class Struggles in Tanzania* (Dar es Salaam: Tanzania Publishing House).

18 For a more detailed discussion of the concept of "illiberalism" see Fareed Zakaria "The Rise of Illiberal Democracy," *Foreign Affairs*, Nov./Dec 1997. Zakaria defines illiberalism as "democracy without constitutional liberalism—i.e. respect for human rights and the rule of law. In summary, Zakaria argues as follows. Around the world, democratically elected regimes are routinely ignoring limits on their power and depriving citizens of their basic freedoms. From Peru to the Philippines, we see the rise of a disturbing phenomenon: illiberal democracy. It has been difficult to recognize because for the last century in the West, democracy—free and fair elections—has gone hand in hand with constitutional liberalism—the rule of law and basic human rights. But in rest of the world these two concepts are coming apart.

19 NARC had created a top governing organ called "The Summit" whose membership was divided equally among the coalition partners. But it was quite clear, however, that the Rainbow Alliance was dominant in this body by virtue of the seniority and popularity of its representatives in this body. The Mount Kenya representatives felt outgunned and "out-influenced."

20 The comment "for us getting Kibaki into the Presidency was the most important thing, the rest can wait" was a comment made by an influential NAK leader as NARC's consultative forum in Nanyuki in April 2003.

21 See, for example, (2008) *The Independent Review Committee Report* (Nairobi: Government Printers)

22 The concept "failed state" emerged recently in the analysis of political systems which collapse completely and lose the ability to govern, with society deteriorating into civil strife and wars for prolonged periods of time. Democratic Republic of Congo (DRC), Somalia, Liberia, Sierra Leone and Cote d'Ivoire are such failed states in Africa. Quite often states begin to fail following disputed or inconclusive elections, quite often "unconcluded" due to the refusal of an incumbent president to leave power when he loses an election.

23 The Independent Review Committee (IREC) chaired by Justice Kriegler.

24 The manifesto was entitled *Deepening Reforms for Equity and Social Justice: Our Plan for Government 2013–2017*.

25 Orange Democratic Movement (2007), *Prosperity with Equity and Accountability*, Chapter 16 (Nairobi: Orange Democratic Movement)

26 Susanne Mueller (2014), "Kenya and the International Criminal Court (ICC): Politics, the Election and the law", *Journal of Eastern African Studies*, Vol.8, No. 1:25–42.

27 This has been evident in the roles played by Mwai Kibaki, Daniel Toroitich arap Moi and Christopher Kirubi in the Uhuru presidency. Not only does Uhuru consult Moi frequently, but Moi has occasionally issued statements in support of the Uhuru presidency. The content of the statements go beyond mere public relations exercises: they reveal common interest institutionalized over time.

28 See en.m.wikipedia.org/wiki/Orange_Democratic_Movement#2013_Ge

29 See C. Wright Mills (2000) *The Power Elite*. Oxford: Oxford University Press.

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Insecurity and Election Outcomes: The Case of Kenya in 2013 General Elections

MUSAMBAYI KATUMANGA

Introduction

The level of any society's political maturity may be measured by the political culture that underpins electoral cycles. This chapter explores the foregoing in the context of Kenya's 2013 electoral process. It essentially responds to the question: How did insecurity contribute to the victory of the Jubilee Coalition in the 2013 general election? Conversely, to what extent can election outcomes be attributed to the way such security instruments are (or are not) employed?

The contention of this chapter is that a State will be considered as developing in political terms to the extent that each electoral cycle is an improvement and indeed a consolidation of the preceding cycle. Recurrence of planned violence, in electoral cycles is a threat to State legitimacy. It is quite possible that the win by the Jubilee Coalition in the 2013 election was a result of the failure of the State to dominate instruments of violence in order to guarantee security. Put differently, the Jubilee win may be attributed, at least to a certain degree, to insecurity in different parts of the county.

The foregoing is explored through an examination of State security behavior especially in terms of the violence prior to, in the course of, and following voting across four locations: namely, coastal, North Eastern, parts of Baringo in the Rift Valley and Bungoma-Busia (Western).

Geographies of violence and the march towards 2013 elections

Between November 2011 and February 2013, seven forms of violence were discerned; politically-instigated violence directed at certain identities, political campaign violence, terrorism, militia, vigilante/gangs, cattle-rustling, and, criminal violence. These were carried out by a variegated set of armed groups (see table below) (CMD 2013).¹

In January 2013, Nairobi recorded the highest number of incidences (24), followed by Garissa (23), Mandera (16), Mombasa (15), Tana River (13), Kilifi and Wajir (10) each, among others. Garissa, Nairobi, Mandera and Wajir have continued to experience the worst forms of violence. Garissa had 20 attacks, Nairobi (14), Mandera (13), Wajir (10), Mombasa (eight), and Lamu (one) (CMD 2–6). By February 3, 2013, 31 cases of politically-instigated violence targeting certain identities had been recorded. Tana River led with seven incidences (See Table 1 below). It is notable that all the Tana River incidences occurred between August 2012 and January 2013 in spite of the deployment of more than 1500 policemen.

In Baringo, more than 20,000 people were displaced. Residents lost 6000 herds of cattle, 14000 goats from activities of heavily armed raiders (Kiprotich 2013:11). Baragoi stood out as an exemplification of citizen neutralisation of State’s internal instruments of violence. Organised militias killed at least 40 armed police and paramilitary before disorganising and dispersing the rest in a bungled operation (CMD *ibid.*). Eight gang war incidences were recorded. Nairobi recorded most with three, while Mombasa, Machakos, Trans Nzoia, Siaya and Kisumu recorded one each. Isiolo, Laikipia, and Samburu, experienced five, four and two incidents respectively while Marsabit, Meru and Garissa experienced one each (CMD *ibid.*).

The most violent counties were Nairobi, Garissa, Mandera, Mombasa, and Tana River. The period between August and February 2013 registered high incidents of violence at 24, 23, 16, 15 and 13 respectively. January 2013 was the most violent month, recording 37 incidences. Terrorism increased in November and December 2012 and January 2013 as new forms of suicide attacks also emerged. Two such incidents were recorded in Dadaab and Ifo refugee camps. As at February 3, 2013, 463 civilians had been reported killed as a result of violence. Seventy policemen and nine Kenya Defence Forces members had also been reported dead from incidents ranging from militia to terror attacks. Some

643 civilians, 49 policemen and nine KDF soldiers had been reported injured (CMD *ibid*).

Table 1: Number of deaths and injuries from attacks

	Terrorist	Militia	Vigilante	Bandit	Cattle-rustling	Ethnic	Crime	Accidents	Political	Extra-judicial	Total
Civilian deaths	101	118	5	38	27	161	1	—	10	2	463
Police deaths	21	44	1	2	—	—	—	2	—	—	70
Military deaths	5	3	—	—	1	—	—	—	—	—	9
Civilian injuries	488	14	6	11	58	60	3	—	3	—	643
Police injuries	39	3	1	—	—	6	—	—	—	—	49
Military injuries	9	—	—	—	—	—	—	—	—	—	9
	663	182	13	51	86	227	4	2	13	2	1243

Source: CMD Nairobi 30/2/2013

Table 2: Lowest Counties—By Voter Registration Turn-out

	Incidences	Voter Registration Turn out
Mandera	16	25.3
Turkana	9	30.2
Wajir	10	35.7
Garissa	23	40.0
West Pokot	1	45.1

Source: Voter Registration Turn-out—IEBC Website, Registered Voters by 18th December 2012.²

Table 3: Voter Turnout Database

Year	Election type	Population	Registration	Voting age population	Total vote	VAP Turnout (%)	Turnout (%) to Total pop.	Voter turnout (%)
2013	Parliamentary	43,013,341	14,352,533	22,177,678	12,330,028	55.6	28.7	85.91
2013	Presidential	43,013,341	14,352,533	22,177,678	12,330,028	55.6	28.7	85.91
2007	Parliamentary	36,913,721	14,296,180	18,126,573	9,877,028	54.49	26.8	69.09
2007	Presidential	36,913,721	14,296,180	18,126,573	9,877,028	54.49	26.8	69.09
2002	Parliamentary	31,138,735	10,451,150	15,517,826	5,976,205	38.51	19.2	57.18
2002	Presidential	31,138,735	10,451,150	15,517,826	5,975,910	38.51	18.9	57.18
1997	Parliamentary	28,784,000	9,030,092	12,664,960	5,910,580	46.67	20.5	65.45
1997	Presidential	28,784,000	5,095,850	12,664,960	4,273,595	33.74	14.8	83.86
1992	Parliamentary	25,700,000	7,855,880	11,308,000	4,622,764	40.88	18	58.84
1992	Presidential	25,700,000	7,855,880	11,308,000	5,248,596	46.41	20.4	66.81

Source: Voter Turnout Database Query—IDEA WebsiteTop of Form

A total of 14,352, 533 persons were reported to have registered to vote. Of these only 12,221,053 (85.91 per cent) were reported to have voted, implying that 2,022,196 (14.09 per cent) did not vote. Compared to 2007 elections, which registered 14,296,180, the number of voters only went up by 57,801 in 2013. In effect this is the lowest incremental difference between succeeding electoral cycles. For instance, 2002 and 2007 general elections had a difference of 3,843,582. While there could be several factors that may account for total voter registration and turn out in elections, the variable of political instability, especially a felt sense of insecurity, may be telling even in the context of a highly charged polarising environment.

IEBC had projected to register 18.2 million voters. Instead it merely managed 14.3 million, representing 78 per cent of the target. Compared to the population census of 2009, which put the number at 38.6 million, the 14.3 million registered voters amounted to 37 per cent of the total population only slightly better than the 1992 elections, which was at 36.6 per cent. In other words, the 2007 at 41 per cent, and 2002 at 47 per cent, were well above it. This number drops further to 28 per cent if the population figure is put at the estimated population of

43,013,341 as at the time of the 2013 elections (IIDEA 2014). It is only slightly better than 2007, with its estimated population of 36,913,721 (*ibid.*). The 2013 figure is also lower than 1992 and 1997 elections whose turn out were 46.2 per cent and 33.74 per cent out of estimated populations as at election of 25,700,000 and 28,784,000 respectively (*ibid.*). Therefore, it is apparent that less people registered to vote in 2013. This was pronounced especially in these areas noted for high incidents of violence.

Compared to population on the basis of the previous provincial boundaries Nairobi, with a population of 3.1 million, had a voter registration of 57 per cent, Central Province with 4.3 million recorded 50 per cent, Eastern with 5.6 million was at 37 per cent, Nyanza with 5.4 million had 36 per cent, Coast with 3.3 million had 35 per cent, Rift Valley with 10 million had 34 per cent, Western with 4.3 million was 33 per cent, and North Eastern with 2.3 million had 15 per cent. Other than Nairobi and Central provinces whose figures were 50 per cent and above, the rest were below. It is notable that Coast, Rift Valley, Western, and North eastern suffered extreme forms of violence much of it bordering on some form of or a mutation with inclinations towards insurgency.

If the population census of 2009 is adopted, North Eastern Province had a population expansion of 240 per cent, up from 962,143 in 1999 to 1,025,756 in 2009. Mandera's population experienced a 400 per cent growth from 250,372 in 1999 to 1,025,756 in 2009. But at the end of registration, it was apparent that registered figures in Mandera were far lower. The same applied to other areas that experienced some form of militarised violence. It is plausible to argue that intensity of instability, especially the variable of violence, may have underpinned the low levels of registration and voting. This becomes apparent given warnings sounded by Al Shabaab to destabilise Kenya (CMD 15–16). It had gone ahead to offer rewards of \$100,000 for every KDF Officer killed and \$10,000 for every soldier. As more soldiers were targeted, the potential erosion of citizen confidence in the capacity of security institutions to protect them seemed to diminish.

The Indian Ocean belt: Electoral violence in Tana River and Mombasa

The Coast is among those regions that experienced violence prior to and during the electoral process. Tana Delta in the Tana river County³ with a population of 87,201 and three districts Garsen, Tarassa and Kipini accounting 47,476, 23,659, 16,066 respectively registered high intensity of pre-election violence. Prior to

2013 elections, Garsen District, the epicentre of the conflicts, had three constituencies. Galole and Bura were under ODM leaving Garsen under PNU of President Mwai Kibaki. Main communities here are Pokomo, Orma, and Wardei.⁴ Tensions between the Pokomo against the Orma revolve around access to water, pasture, land and more fundamentally political power and contested citizenship. Pokomo see themselves as the indigenes, a position disputed by Orma who seek to go beyond colonially mediated access to water through what was called Malka (corridors) to assert that it had a right of access to the resources.

This was worsened by limited social and economic development translated into unexploited resources. Notably, integration among communities remains a challenge constrained further by politicians who seek to manipulate identities in a bid to access political power. The situation was not helped by a lack of State intervention to guarantee security. Worse still was the perennial inability of security organs to exploit not only intelligence but to also manage resource allocation. During the outbreak of conflicts in August and September 2012 in Chamwanamuma, Semikero, Rikita and Tarasaa division, Kau division and Kilelegwani in Kipini division the State security institutions were found wanting (CMD 2012).

“...on 10th September 2012 at Kilelegwani, Pokomo launched attacks. Estimated 200 youth armed with guns, bows, spears and other crude weapons attacked the village and killed 9 police officers who had been deployed to provide security in the area” (KNCHR 14).

That police officers could be targeted points to the extent to which internal security infrastructure have been exposed by radicalised religious militants. The pattern of attacks targeting civilians continued.⁵ The extent of inverted mirror image of military behaviour was apparent in their attempt at uniformation through adoption of ribbons tied on their heads. Equally prominent was their command and control, organised recovery of those injured pointing to training. This factor had been highlighted in narratives that sought to point to the presence of the Mombasa Republican Council (MRC) as the trainers. By September 2012, Kenya Red Cross estimates reported that 668 houses had been burnt, 458 heads of cattle killed or stolen, 3,302 households and a population of 19,979 displaced. Some 4231 children under five and another 7,488 between 6–18 displaced (*ibid.*).

The government eventually set up extra patrol bases as more than 1,000 GSU officers were deployed. That the clashes occurred despite intelligence warning

points to poor exploitation of intelligence. The presence of Kenya Police Reservists (KPR) seemed to make matters worse. Without proper leadership, these elements were quickly drafted in to the ethnic equation. The presence of KPR gave the impression that the State was out-sourcing security. The situation was compounded by the size of Tana Delta. At 38,000 km², the area is inaccessible. Riketa and Ozi, for instance, are characterised by a marshy terrain accessible only by boat. The area ranks 43rd in poverty out of 47 counties. The net effect is that it has a huge number of idle poor youth.⁶ Terrain gives time and space for training and organisation. The fact that most of these people remained displaced accounts for low registration and voter turnout. Indeed, the broad narrative here was that the violence had a direct link with election fears. In effect, the emergence of counties as units of governance and the need to control who gets what and when had transformed and militarised politics in the Tana Delta.

The Mombasa region experienced violence pre-election during the elections. Violence targeting Independent Elections and Boundaries Commission employees and activities occurred as the Commission attempted to undertake trial runs of the process. This was followed by warnings attributed to MRC who sought to discourage participation calling instead for secession of the coastal region. The assumption here therefore was that internal security structures, appreciating the sensitivity of the elections, would forestall disruptions if any with the use of intelligence. That was not to be. Instead on the election day, two simultaneous operations were carried out targeting the process. According to the Inspector General of Police, an estimated group of 200 militia armed with guns, machetes, bows and arrows set a trap for police before dawn, killing five officers (Smith 2013). A second attack was launched in Kilifi resulting in the death of one officer and seven civilians.

MRC spokesman Rashid Mraja, speaking to Reuters, rejected attempts to link the group to the attacks. He said: "We are not responsible for any attacks anywhere in this region" (*ibid.*). Following the attack 400 extra officers were flown in from Nairobi. On the ground several elements of the military were also deployed. But by then the impact had been felt. It would be telling as the outcomes of the election were analysed. The Coastal counties had uncharacteristically lower turn out compared to others, except for those in the former North Eastern Province. The *Daily Nation* would remark that low turnout may have been CORD's undoing (Kiberenge 2014).

The region registered the least turnout of just 70 per cent of the 1,171,240 registered voters compared to other regions that posted over 80 per cent. Raila Odinga of CORD was said to have garnered 612,057 to Uhuru Kenyatta's 158,083 in the region. It is notable that the latter was pronounced winner by 50.07 to Odinga's 40.9. A total 8,419 is said to have propelled Uhuru over the 1 per cent mark. The issue to grapple with is the apparent extent to which *security dynamics at the Coast in spaces such as Tana River Mombasa and Kilifi may have decided the outcome of the said elections?* It is interesting that the police would rush in reinforcements after the fact instead of using intelligence to forestall the same. It points to the fact that they prepared themselves more to contain post-election violence similar to that which had been experienced in 2007–8. More interesting is the statement by the Inspector General that the police had fallen into a trap. This admission points to the inability to exploit intelligence compared to its converse use by asymmetrical actors. Thus, it not a surprise that the region has continued to degenerate post-election as the new electoral cycle advances towards the anticipated 2017 elections; this time round mediated by terrorism and secessionist tendencies.

Threats to both the State and the entire democratic project did not end on the voting day. If the terrorist did not effect the Samsonian option, it was not because of not trying. Indeed, 2013 stands out more for failed Al Shabaab operations that sought intense weight in terms of consequences at global, regional and state-centric levels and whose success would have had a telling impact across the Eastern Africa. For instance, Al Shabaab planned a strike meant to maximise on the political tension to engender both State and regional instability by targeting the 2013 general elections⁷ and during the presidential swearing in ceremony in April 2013 at Kasarani Sports Centre. It was foiled by the Tanzanian intelligence. President Jakaya Kikwete notes as much when he says: “I remember we had to deal with some groups that wanted to disrupt the Kenyan elections. They were trying to hide here and we had to arrest them before the Kenyan elections” (Kalinaki 2014). Acting on a tip off from Tanzania, four suspected terrorists were picked up on the eve of elections while three others were picked up before the swearing-in ceremony of the President-elect. Other operations that failed include planned attacks on the Parliament and the Holy Family Basilica.

Post-election violence: Bungoma-Busia

Attacks in Bungoma and Busia Counties began on the election day, March 4, 2013, in Mukhuyu village (Busia) and spread to Bungoma by April 11, 2013. Well-organised armed gangs carried out attacks on nine villages. By May 11, 2013, 14 people had been hacked to death. Some 150 had been injured. The worst attack was on April 26, 2013 in Bungoma's Kikwechi Village when 54 people were attacked and slashed with *Machetes* (Human Rights Watch 2014:21). This prompted the Deputy President to fly to Bungoma. In a meeting at Kabula Catholic Pastoral Centre, attended by the Inspector General of Police David Kimaiyo, the Director of CID, Ndegwa Muhoro, and political leaders, the Deputy President William Ruto laid the blame on the Western Provincial Commissioner. "Bwana PC, will I be right to say you have failed?" PC James Ole Serian was being faulted for not having called a security meeting. The County Commissioner Jamleck Barugu was also lambasted for failing to contain crime. What the Deputy President did not seem to understand was that the problem lay elsewhere. While broad narratives seemed to attribute insecurity to politics and local business rivalries, the success of actions of these groups was rooted in the failed security architecture (*ibid.*).

The notion of merging services or better still aligning them, had failed. It instead created a crisis of command and control at the county levels. The main leadership of the Administration Police (AP) was the Provincial Administration. With new constitutional arrangements, this had shifted with AP seeking their independence albeit with serious gaps in leadership. Compounding this is the clear shortage of personnel worsened by the fact that the officers scrambled to be deployed to areas where their interests would be greatly served. Thus, most police preferred being deployed to lucrative places like banks and other commercial enterprises or to man the roads, which offered a chance for extorting motorists. The implication is that probity and competence had over time been eroded as officers overstayed in their stations and increasingly got incorporated into the informal networks. A few that were well deployed lacked critical resources, including transport, rendering them ineffective.

The Deputy President seemed to implicitly acknowledge this gap, taking over the broad strategic and operational role of the police high command by ordering the deployment of 150 General Service Unit officers to quell the violence. But the deployment would be insignificant if no attempt was made to explain why intelligence reports were not acted upon. In other words, was it a systemic

inability to exploit intelligence or was it in effect an actual issue of intelligence failure?

This lack of seriousness in approach was highlighted by Human Rights Watch African Director Leslie Lefkow when she noted: “The police did not collect critical evidence and completely ignored evidence that gangs carried out these crimes during and after the elections with the support politicians and businessmen.”

According to HRW, the attacks were organised and supported by proxies of politicians and businessmen who supported PNU in 2007 elections and either Jubilee or CORD in 2013 elections.⁸

“Ahead of the 2007 elections, businessmen in Bungoma had recruited young fighters between 20 and 30 years old to defend the government and the property of businessmen....They offered to pay me Kshs 250,000 (US\$ 2,900) if I helped recruit the fighters” “...a recruiter said he was paid Kshs 250,000 in batches of Kshs 50,000 after recruiting 60 young fighters who were taken to Naivasha for training in 2007... The recruitment apparently resumed in 2012. According to recruiters and gang members interviewed by HRW in 2012 and 2013, the young fighters were again recruited by...politicians and business men and taken to Naivasha for training including combat, knife and sword training as well as physical combat.”¹⁰

The Inspector General seemed to affirm this when he notes to HRW that the police were aware that the attackers were hired by politicians. “Those of you who have been down there and know what is happening in Busia and Bungoma also know that these attacks are political.”¹¹ These attacks operated with impunity because there was a feeling of invincibility on the part of attackers and security officials. This was a case of State absence and abstinence. A clear process of symbiosis between criminals and political and business actors mediated it; the former outsourced their violence to the latter in exchange for cash rewards and protection. People were being punished for voting wrongly given the outcomes as they affected national and local political equation in relation to business interests. In this sense, the process of paralysing formal security structures to create a security void before subsequently occupying it with trained elements, points to new forms appropriation of organised private violence by political and business notables. This is a reinvented form of mercenary free company or condottiere,¹² the main difference here is that, they are created through a contract offered to entrepreneurs of violence by businessmen and politicians with enabled by state security vulnerabilities. Their structures

remain informal allowing the groups to de-mobilise only to be reactivated in the next election cycle. Their net impact is the increased levels of inverted mirror images of militarisation of society, reduced level of state domination of instruments of violence and by inference increased levels of violence. The authority of the State is sharply challenged by other forces.

Implications of the violence on the State

According to Max Weber (1919:77), the State is a community which successfully claims authority over legitimate use of physical force in a given territory. By using institutions such as the military and the police, the State is able to bring order and reduce violence that may result from identity, sectarian, subjective and contending claims by rulers, bandits and kingdoms. The core aim of this State formation process is to force actors to assume and demonstrate control in exchange for recognition of their claims. This is how States came to be granted territorial integrity, which involved the right to govern without external interference, and the right to monopoly of and over violence, within their delineated spaces (Keohane 2003:149–152).

To succeed, the State should be able to express administrative, legal, extractive and coercive capabilities in all areas under its jurisdiction. When it fails to do so, it increases the risk of other internal and external forces interfering. Indeed, the extent of external contestation of a State's juridical character consequent to a diminished empirical capacity to provide security currently manifests itself in what is referred to as 'the responsibility to protect' ('R2P'). Under R2P, external forces can step in to take control of affairs, which would ordinarily be under the domain of the State.

The process of governing and the use of power (Foucault 2001) is made manifest and distinct through specific processes that allow the population and the economy to be administered for purposes of deepening the presence of the government. Part of this process imposes on the State the responsibility of moving away from the mere exercise of sovereignty as the right to take life or let live, to seize life or suppress it, but rather to foster life (*ibid.*). The notion of sovereignty shifts from the absoluteness of the king to the process of value-addition for the citizen. Here, the State has to be driven by the logic of capturing and imposing control and canalising the individual interests and desires facilitated by acquisition of new forms of knowledge and techniques.

A State has to go beyond what Tilly (1987:3–7) calls a ‘security racket’—that promise to lay claim to a monopoly over violence in order to offer security in return for extractions in the form of taxes, revenues, and labor in order to consolidate its legitimacy. Critical here is the development of its triage: the ideas, institutions, and a physical base to facilitate State security (Buzan 1991). Institutions are fundamental given their functional role as the arteries through which regulatory functions are undertaken and welfare goals achieved. These have to be perceived at two levels of human resources that provide actors who operationalise objectives for which institutions are developed, and such institutions themselves

The net outcome of this process is security governance: a realm of behavior that engenders expanded legitimacy and the expression of sovereignty by political actors. Complementary to this is the ‘death’ of private armies, privateers and mercenaries as a reflection of the State’s monopoly of violence. Mandel’s (2000:3) contention that the “contemporary organisation of global violence is neither timeless nor natural but it is distinctly modern” finds rationality in the foregoing. This is manifest in an entity’s ability to exercise sovereignty over its territory, and by inference, providing security which serves as an ‘accepted’ source of identity (Zartman 1985:5). While creating and sustaining a favourable arena for politics, the entity should possess institutional capacity to mediate input and output roles (Dawisha 1988:7). The more this is the case, the stronger it is as an entity. Modernity here, therefore, implies not only that ability to have monopoly control of violence and organised institutions (Hutchful 2000:211), but also a leadership that generates security-enhancing ideas, and therefore diminishing a recourse to violence by non-State actors and external forces.

Like many other African states, Kenya has essentially remained a project of extraction animated by the absence of an organically negotiated Tillian settlement of protection in exchange for taxation (Tilly 1987:3–7). It does not have dominance over instruments of violence. This is despite the fact that the key determinant of the emergence of a Weberian order is the State’s monopoly over violence. The Kenyan State is constantly challenged by its uncompleted project of internal territorial confirmation and consolidation.¹³ But it is also important to note that for various reasons, including partisan politics, some formal State actors invest in non-State violence when convenient by sponsoring gangs to attack citizens. Such activities by State officers contribute to weakening of the

State. Whether it is on the basis of sectarian, class, or vertical ethnic considerations, the State continues to be conceived as a contested, if not exclusionary, project of extraction. Notably, a mutual tradeoff between rulers and the ruled to establish proper constraints on State actions while generating a broad ideology around which citizen behavior can be mediated is yet to be consolidated.

Challenged by paucity of leadership possessing a strong strategic culture, internal and external security organisations have essentially retained their colonial mirror-image, constrained in their task of creating an aura of identity and protection for citizens. Citizens who have felt left out have in turn, sought to replicate this mirror-image of the State and security organisations to create in effect inverted and multiple replicas of the said security organs. The net effect is the emergence of multiple organic and organised groups seeking to securitise various objects of security ranging from collective identity and sites of extractions, to consolidation of political power. The consequence is the evolution of contested and sometimes ungovernable spaces occupied by termite movements and bandits.

The first space is the 'Nation-State' itself. Here citizen equality-before-the-law is espoused despite the fact that discourses about its ideal stand in contradiction to the inability to guarantee various forms of security, in particular, the vote, property and Kenyan identity. In North Eastern and Coastal regions, for example, national identification cards are not easily provided, making it difficult for certain individuals to show that they are citizens. A second spatial realm of contested predation is that in which youth violence is exchanged as a commodity for the ethnic gerontocracy. Youth are hired by elders to unleash violence in order that the latter can maintain or acquire power in the process reproducing mirror-images of order and political power. Yet a third is that of indigeneity. Here ethnic belonging determines the right to citizenship, while its historical experience is re-invented and presented as threatened and therefore needing protection from "others" through the production of mirror-images of the military.

The result of this is the variegated forms of distance decay in these spaces.¹⁴ The interaction between the State and various geographical locales declines as the distance between them increases. This can take different forms. The first form of de-capacitation is the administrative distance decay manifested by the aura of rule imposition and control. Administratively, the State is not felt as police stations, law courts and institutions charged with provision of administrative services are located far from communities which need them. This factor has underpinned the emergence of predatory activities and the increasing shift from State service provision to gangs. The second form is economic decay undergirded by extent of poverty, exclusion and inability of the State to create value in space; a process that has spawned predation. Lack of economic inclusion makes it difficult for the State to be felt.

Nothing continues to undermine the probity of the Kenyan State and its consolidation project more than the resultant symbiotic and parasitic relationships that has evolved between militia services and citizens in some parts of the State. The stronger this relationship, the weaker the converse relationship with the State. During elections, militia services are hired by politicians as they seek to acquire power. In doing so, the political culture around general elections becomes defined by violence, undermining the right of voters to choose their leaders freely, an important attribute of democratic practice.

Notes

1 Mainly derived from Media Monitoring Sources.

2 It should be appreciated that figures given by IEBC remain contested. CMD *Ibid.* p.7–8.

3 Tana River County is made up of three districts; the Tana North, Tana river and Tana Delta.

4 Others include Somali, Giriama, Luo, Gosi.

5 Interview with senior Security Officers Nairobi Java Coffee House August 2012.

6 Appreciations from a Senior Officer in Internal Security and Provincial Administration Ministry. Nairobi Java Coffee House-Junction August 2012.

7 Security threat appreciations and simulations by the Center For Multi-party Team and The Consulting House respectively warned and pointed to this threat Prior to the March 2013 elections.

8 HRW *op. cit.* p.13.

9 HRW quoting a Businessman.

10 *Op. cit.* p.112.

11 HRW. *Ibid.* p.27/

12 Fighting men who offered their skills jointly, their structures were *ad hoc*, hard to monitor and control. See Zarate, J. C “the Emergence of a New Dog Of War: Private International security Companies, International Law, and New World, disorder”, In Stanford Journal of International Law, 34(75), 1998, pp.81–84.

13 At internal levels, disputes persist between and within ethnic entities on borders and land. The same is repeated cross international frontiers such as Kenya –South Sudan, Kenya Somalia

14 Distance decay here refers to a felt sense of distancing between two objects in terms space and time. The further they are the higher the felt sense of disconnection and decay.

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Explaining and Mitigating Elections-Related Violence and Human Rights Violations in Kenya

MUTUMA RUTEERE AND KAMAU WAIRURI

Introduction

Much of the literature on human rights and elections-related violence in Kenya focuses on the patterns and nature of the human rights violations and assessment of the relevant norms that these acts transgress. Explanations of why the violations occur have received little critical attention in these analyses.¹ This is hardly surprising as the human rights approach has traditionally privileged the ethical evaluation of conduct over their socio-scientific explanation.² Additionally, many analysts have focused on the ethnic dimensions. While this presents an important perspective to the violence, merely characterising the violence as between two ethnic communities is to provide a statement of the problem minus explanation. However, to design appropriate policy interventions to prevent or mitigate the violations, it is important to bring more than ethical evaluations to the analysis of the problem. After all, violence and human rights violations are social facts, products of social processes, which have socio-political, economic and sociological explanations.

Proper understanding of the underlying causes of election-related violence becomes critical if we are to design effective measures of dealing with them. Towards this end, we explore some explanations for electoral violence and attendant human rights violations in Kenya and evaluate some of the approaches

that have been adopted so far. We argue that the root causes of violence lie in the lack of legitimacy of State institutions and the outcomes they generate as well as the sense of impunity that perpetrators seem to enjoy. Consequently, interventions to mitigate election-related violence should focus on improving the legitimacy of State institutions and ensuring that perpetrators are held to account for their actions.

A history of electoral violence and human rights violations

Kenya's elections since the return to multiparty democracy in 1991 have been accompanied by political violence and serious human rights violations. Virtually every General Election cycle has witnessed deaths, injuries, displacements and wanton destruction of property. Four of the last five elections (1992, 1997, 2007, 2013) held in Kenya have been marked by violence. The 2002 election, which saw the victory of a united opposition at the end of Daniel arap Moi's 24-year rule, was the only one considered relatively peaceful thus far. Thousands of people have been killed and hundreds of thousands have displaced by political violence in Kenya since 1991. Its significance cannot therefore be overemphasised. Though some of the violence has been perpetrated directly by agents of the state against the citizens, much of the violence has been between citizens themselves.

Political violence in Kenya often takes an ethnic perspective. People are victimised primarily because of belonging to a particular ethnic community whose political inclinations are seen as running counter to that of their attackers. Usually, members of certain groups are attacked in places where they are seen as outsiders and comprise a numerical minority yet influential economically or politically. This outbreak of inter-ethnic violence in 1991 was a response of supporters of the then President Moi to the clamour for the reintroduction of multiparty politics in the country. The outbreak of the politically-motivated ethnic violence in the Rift Valley was also an attempt to alter the political geography of the area by evicting members of communities that supported the Opposition in light of the emerging threat to Moi's rule (HRW 1993; Kagwanja 1998). The violence was preceded by threats to those communities by politicians within the ruling party (KANU), and has, therefore, been interpreted as State-sponsored (RoK 1992; RoK 1999). In that violence, it is estimated that 1,500 people were killed and more than 300,000 persons internally displaced (HRW, 1993). The violence that occurred in the lead up to the 1997 General Election

was similar except that it spread beyond the Rift Valley to include the Coast province. Similar to the 1991 occurrences, members of communities seen as opposed to President Daniel arap Moi were again targeted with violence and eviction from the two regions.

The 2007–2008 post-election violence is undoubtedly the most memorable of all the cases of electoral-related violence in the country. The violence, which attracted heavy international attention, claimed some 1,133 lives and precipitated the displacement of over 300,000 others. Several investigations into the violence, including the official State inquiry, concluded that the violence, which was provoked by the disputed result of the presidential election, took an ethnic dimension (RoK 2008). Similar to previous cases, people were attacked primarily on the basis of their identity as members of an ethnic group. A significant difference of this violence from the previous ones was its geographic spread. The violence affected six of Kenya's eight provinces (the Rift Valley, Nairobi, Western, Coast, Central and Nyanza) as the country was then structured.

The violence marked the explosion of the already deep political and ethnic divisions in the country. The political union of parties led by Mwai Kibaki and Raila Odinga that brought the NARC administration to power had collapsed. Ministers affiliated to Odinga's party, the Liberal Democratic Party, were dismissed after the government had suffered an embarrassing defeat in a constitutional referendum in 2005, which they opposed. When the now defunct Electoral Commission of Kenya (ECK) declared the incumbent President Kibaki the winner, the Opposition contested the result and their supporters poured onto the street marking the beginning of the violence. Expectedly, they targeted people from ethnic communities that were seen as supporters of President Kibaki's Party of National Unity (PNU). People whose communities were seen as supporting Raila Odinga's Orange Democratic Movement (ODM) were the target of the retaliatory attacks that followed. In much of the Rift Valley Province, the hotspot of the violence, there were widespread attacks on members of the Kikuyu and Kisii communities, and to an extent Luhya communities, who were supporters of PNU. Similar attacks on these groups were witnessed in Western, Coast and Nyanza regions. In Nairobi, Central, and some parts of the Rift Valley regions, members of the Luo, Kalenjin, and Luhya communities were attacked as part of revenge violence orchestrated mainly by the Kikuyu community. Moreover, many individuals were killed by the police in circumstances that clearly

pointed to excessive use of force by the security agencies (*Ibid.*; HRW 2008; KNCHR 2008).

Even though the result of the subsequent presidential election held in 2013 was similarly contested, the country did not experience widespread violence as in 2007. There were some instances of violence preceding the vote. For instance, some 13 people lost their lives on the eve of the election day in an attack attributed to the Mombasa Republic Council a secessionist group in the coastal region.³ There were also some reported cases of violence after the Supreme Court upheld the election of Uhuru Kenyatta as President.

Explaining political violence in Kenya

Any attempt at explaining political violence during Kenya’s electoral cycle is riddled with political and ethical minefields. To begin with, explaining horrific actions like the mass slaughter of whole families, including innocent children, risks being seen as an attempt to provide them with a justification. Nevertheless, it is important to bring explanatory frameworks into the examination of political violence if appropriate and effective solutions are to emerge. Mahmood Mamdani (2002) has noted the need to locate post-colonial violence in Africa within its history rather than retreating into theology or culture in search of its explanation. There has been a preponderance of writings on the ethnic nature of the electoral violence that while accurately describing the problem, do little to provide its explanation. Literature that merely characterises the violence in 2007/8 as a conflict between the Kikuyu and the Kalenjin or the Luo against the Kikuyu, is a statement minus the explanation. It is not the whole story of the violence. Identities do not fight nor are they, of themselves, sufficient in explaining why conflict and violence takes place.

To unpack the 2007 post-election violence and, indeed, all the other cases of violence during elections, we must look to the very nature of the State and the nature of politics at the heart of the conflict and violence. In fact, the 2007–2008 post-election violence could be seen as a logical continuation of politics in a State where access to or exclusion from rights and power has historically been organised around ethnic identities. Successive post-colonial governments failed to democratise State power, choosing instead to perpetuate the colonial legacy with its divisive logic of allocation and distribution of resources and access to rights on the basis of ethnicity (Mamdani 1996). For instance, the system of administration in post-colonial Kenya has remained organised around districts

and provinces that correspond with the boundaries of ethnic groups as designed in the colonial period. The electoral system in post-colonial Kenya simply replicated this logic. As a result, the demarcation of constituencies geared to accommodate the ethnic interests and ambitions of political leaders. Organising along ethnic lines therefore makes perfect sense to politicians and the electorate as a logical response to a system of politics and state that granted access to political and civic rights on the basis of ethnicity.

At independence, nationalism provided the broad umbrella for organising the masses on pan-ethnic platforms under national mass political parties, Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU). Indeed, as Tom Mboya argued, the “nationalist movement has no time for arguments about ideology, or for differences in economic and social programmes” (Mboya 1986:88–89). Thus, nationalism papered over the ideological divisions within the various parties but also stifled the emergence of clear ideological parties or movements. With the collapse of the nationalist project, ethnicity was left as the most attractive organising idea of Kenyan politics. While the Moi presidency was ostensibly organised around the so-called Nyayo Philosophy of Peace, Love and Unity, in reality President Moi presided over an increasingly authoritarian State whose erosion of popular legitimacy was only counter-balanced by a careful cultivation of ethnic political supremacies across the various communities. These ethnic gatekeepers provided the cover for the increased ethnicisation of the State and politics, a cover that was inevitably blown off once the Moi presidency was confronted with a nationwide demand for the restoration of multiparty politics. Staring at the possibility of real defeat from the Opposition, the Moi administration quickly resorted to the promotion of ethnic divisions and the instigation of the 1990s ethnic violence (HRW 1993; Kagwanja 1998).

It could, therefore, be argued that the seeds of poisoned electoral politics originated from this structural and the historical failure to invest in ideological parties and political movements. As a result, the elevation and preference of ethnicity over ideology meant that political contests would follow ethnic fissures thus widening the ethnic divisions in the country. In the event of close contests, as was the case in 2007 and where the integrity of the elections results were contested, the tinderbox of ethnic conflict could be easily set alight. However, this argument fails to adequately address the absence of widespread violence in 2002 and 2013. Distinguishing the circumstances of these two elections would

help us to better understand political violence in the country. Two plausible explanations for the variations emerge. The first is the legitimacy of State institutions and the outcomes they generate and the second is the extent of impunity that perpetrators enjoy.

Legitimacy of State institutions

Examining the patterns of political violence in Kenya indicates that the legitimacy of State institutions and the outcomes they generate is significant in determining. Following the Inter-Parties Political Group (IPPG) reforms, Kenyans had faith in the ECK to conduct a credible, free and fair election in 2002. Indeed the outcome of the election reflected the wishes of the majority of Kenyans forestalling any violence. The same situation prevailed in 2013. Kenyans had faith in the newly-established institutions, which resulted from a series of governance reforms necessitated by the post-election crisis of 2007/2008.

However, the violence that followed the 2007 general elections can be understood against the background of the denudation of the integrity of key institutions that should mediate political polarisation. The credibility of the ECK was badly battered before the 2007 elections by the decision of President Kibaki to pack it with friendly commissioners in whom the Opposition had little trust. This was in disregard of the 1997 IPPG agreement to allow the appointment of electoral commissioners through a process of consultations between the government and the Opposition. That important concession by then President Moi was key in getting the Opposition to reluctantly accept the results of the 1997 elections that Daniel Moi won. The decision by the Kibaki government to abandon that agreement destroyed whatever little faith the Opposition had in the electoral commission and set the stage for the rejection of any results that would be less than whistle clean. Beyond the electoral commission, several other key institutions had also lost credibility in the eyes of the public and could therefore not mediate the dispute. For the Opposition, the Judiciary did not offer a way out of the crisis of the disputed elections given its long history of complicity in rights violations and the entrenchment of the powers of the governments in power (Makau 2001).

In short, the many atrocities in the 2007 post-election violence were a consequence of an almost total collapse of the credibility of all State institutions that would have defused the crisis before it reached the extreme levels of violence that left so many dead and displaced. The crisis of credibility also went further

to social institutions, including the church and the media. The religious leaders who had in the past been the prophetic voice for justice and had provided moral leadership in challenging the Moi government over its excess had by 2007 found themselves ensnared into the partisan and ethnicised politics that had characterised the run-up to the 2007 general elections. To a considerable extent too, the media had by 2007 become part of this form of divisive politics and was, therefore, unavailable to play the critical role of credible watchdog on public policy.

A culture of impunity

The sense of impunity that has been enjoyed by the perpetrators of political violence since the early 1990s has also been a significant factor in the perpetuation of violence. Hardly anyone has been brought to account for their actions in the violence that rocked the country before the 1992 and 1997 elections. In the 1990s, the State established the Judicial Commission of Inquiry into Tribal Clashes in 1998 (Akiwumi Commission) chaired by Justice Akilano Akiwumi. The Akiwumi Commission, like the 1992 National Assembly's Select Committee to Investigate Ethnic Clashes in Western and other Parts of Kenya of 1992 (the Kiliku Committee), established that senior politicians, senior security officials and members of the provincial administration were complicit in the violence. However, these inquiries did not lead to any prosecutions or acknowledgement of government's failure to provide protection to Kenyans. Instead, the same politicians who had been named in many of the inquiries remained at the centre of power. The action that was taken against some individuals, including politicians and high rankings State officials, who would previously been considered untouchable, may have contributed significantly to the relative peace that followed the 2013 general elections.

The agreement that resolved the political crisis established the Commission of Inquiry into the Post-Election Violence (CIPEV) to investigate the violence and make recommendations for action. CIPEV was conscious of the country's dismal record in addressing electoral related violence and violations. In its words:

The framers of our TORs recognised that impunity lies at the heart of preventing the kind of violence that has been witnessed in the country time and time again. The eradication of impunity will, therefore, not only blow off the cover for persons who break the law of the land but also deter others who may contemplate similar deeds in future (RoK 2008:444).

The CIPEV, chaired by Appellate Judge Philip Waki, recommended the establishment of a local tribunal to try those suspected of bearing most responsibility for the violence. If Parliament failed to establish the local tribunal, the chief mediator (Kofi Annan) would be requested to hand over the findings of the investigations to the Prosecutor of the International Criminal Court for possible action. Failure of the Kenyan Parliament to establish the tribunal led to the indictment of six Kenyans at the ICC. The six were: Francis Muthaura (Head of Civil Service), Henry Kosgey (ODM Chairperson), Uhuru Kenyatta (then leader of KANU and key supporter of President Mwai Kibaki), Major General Hussein Ali (then the Commissioner of Police), William Ruto (then a key figure in the opposition ODM) and radio journalist Joshua Arap Sang. As of 2014, only Deputy President William Ruto and radio Journalist Sang were still facing charges at the ICC with all the other cases having been dropped.

Dealing with electoral-related violations

To give fair indication of how electoral violence should be dealt with, it is important to assess what has been done so far and consider what opportunities lie ahead.

The African Union driven resolution of the 2007–2008 political crisis included firm commitments to restructure key institutions of governance whose failure had precipitated the crisis. The reforms included the Electoral Commission of Kenya (ECK), which was disbanded and replaced with an interim commission that would later transition into IEBC. The constitutional reform process that had stalled was given a fresh impetus leading to the adoption and promulgation of a new constitution in 2010. The new Constitution would also set the basis for the radical reform of the discredited Judiciary with the incumbent Chief Justice Evans Gicheru sent into retirement and the vetting of all judicial officers put in motion. These legal and institutional reforms that established legitimate institutions were a significant step in preventing the emergence of election-related violence in the future.

The indictment of key political figures at the ICC has also been seen as an effective deterrence against the repeat of such violence. The quiet influence of the ICC in the relative peace that prevailed during those elections was evident besides the drama of the political alliance between William Ruto and Uhuru Kenyatta, who were on opposite sides in 2007 and who in 2013 stood accused of organising violence against each other’s supporters. Politicians were strikingly

careful not to make incendiary remarks and the media houses remained largely restrained in their coverage of the political campaigns. In spite of the many missteps of the ICC with regard to the Kenyan cases, it is quite evident that such criminal justice approaches hold great potential as deterrence against violence. Indeed this could very well be their single most important contribution—not punishment of perpetrators but the preventive potential.

However, the question of criminal justice accountability for elections-related violations requires a more nuanced approach. Unless such accountability is accompanied by a comprehensive restructuring and transformation of the state to ensure the equitable access to rights and new ways of political organising, criminal trials may exacerbate the problems of ethnic or social divisions within a state even further. In countries like Kenya where electoral contests degenerate into ethnic conflict, it is much more than individual culpability that is at stake when individuals such as those indicted by the ICC in the Kenya case are brought to trial. Rather, such trials also serve to frame new narratives of victimhood—both individual and collective, which may reignite new cycles of violence (Koskeniemi 2002:1–35).

The international accountability processes are not removed from the problems of international politics. International interventions to deal with serious human rights violations gained prominence in the 1990s following the end of the Cold War and the collapse of communism. Without the suspicions and polarisations of the Cold War, the use of Western military and diplomatic power in the name of human rights gained increased support within some international human rights circles as well as in academic circles. The idea of an international (read Western) intervention in another country (usually non-Western) in response to serious human rights violations rather than on geo-political grounds gained particular attraction to some scholars and policy actors. NATO's relatively successful intervention in Kosovo in 1999 further bolstered the argument of the interventionists and the concept of "humanitarian intervention". Nevertheless, the idea of humanitarian intervention remained internationally contested and intellectually fraught with many difficulties.

To partly address these diplomatic objections and clarify some of the ambiguities, the International Commission on Intervention and State Sovereignty was constituted in 2000 through the initiative of the Canadian government to explore the dilemma of balancing State sovereignty with the universality of human rights. The Commission, co-chaired by former Australian Foreign

Minister, Gareth Evans and then Special Advisor to UN Secretary General, Mohammed Sahnoun, coined and popularised the idea of “Responsibility to Protect” (International Commission on Intervention and State Sovereignty 2001). In their argument, sovereign states have the primary responsibility to protect their citizens against catastrophe. However, in the event they are unable or unwilling to do so, the community of states has the responsibility to provide that protection. Responsibility to Protect doctrine has been applied by some scholars as an explanation for the intervention by international actors into the Kenyan post-election violence.⁴ In his tenure as Secretary General, Kofi Annan, who became the mediator in the Kenyan post-elections violence, had been an enthusiastic supporter of the concept and principle of international intervention within the framework of international law.

Ironically, the internationalisation of the Kenyan post-elections violence and violations through the ICC indictments has revealed the difficulties and challenges confronted by the concept of Responsibility to Protect. Kenya succeeded in rallying the African Union to demand for the exemption of sitting Heads of State from facing trials before the ICC and also succeeded in shining an uncomfortable light on the inadequacies of an international criminal justice system that exempts leaders of the powerful states from accountability from international crimes (Wrong 2014). The withdrawal of four cases at the ICC present the opportunity for an important reflection on the significance, value and implications of international judicial mechanisms in dealing with problems of electoral violence and human rights violations in a context such as Kenya.

The ICC certainly played an important role in promoting relatively peaceful elections in Kenya in 2013. Moreover, it remains as an option of last resort and continues to hang over the necks of potential inciters like the proverbial Sword of Damocles. To that extent, its value must be appreciated and placed on record. Nevertheless, an international judicial mechanism is poorly suited to address structural problems of poor state governance as well as politics. Judicial measures, whether domestic or international, cannot substitute for politics. Indeed, the resort to judicial options is often an admission of failure of politics. Essentially, the solutions to the kind of problems underlying the persistence of electoral violence in Kenya are political and domestic. Devolution, stronger institutions of governance and effective local mechanisms to address impunity represent important ways of addressing the drivers of electoral violence in the country. These are discussed below.

First, equitable distribution of resources across the country is likely to reduce the bitterness over marginalisation that has shaped politics for more than 50 years. A political system and State that is erected on the wheels of ethnic polarisations, ethnic exclusions and marginalisation will inevitably run into ruin. The political rails must be changed so as to transform elections from an ethnic race to control the state. The new Constitution contains the blueprint for the transformation of the country's politics. Through devolution, power has been distributed to various centres and resources are now distributed to all regions of the country without dependence on the patronage of the President in power. However, devolution carries within itself the risk that ethnic divisions and polarisations that have plagued politics at the national level will be replicated at county levels. In almost every county, there are new minorities who see themselves either as marginalised or are seen as privileged by others (Mkutu *et al.* 2014). These kinds of mistrust must be addressed to insulate counties from becoming the new theatres of violence and violations during electoral periods.

Second, the Constitution offers a new opportunity to test new institutions of governance to pre-empt a repeat of the violence of 2007. To this end, it is important that the reforms envisaged under the Constitution are kept alive and the few gains protected. In particular, the reforms of the Judiciary, the security agencies, the electoral commission and land management and administration should be accelerated. If these reforms are aborted, the country is likely to find itself back in the same situation that precipitated the crisis of 2007.

Third, it is important that impunity be addressed through local mechanisms and processes. The Judiciary, with all its current weaknesses, must be tested again and again. There can be no substitute for domestic judicial mechanisms. The modest good record of the post-2010 Judiciary in dealing with human rights violations must be built upon by those working on justice. Beyond judicial processes, there is room for innovation in dealing with the trauma and legacy of electoral violence and violations. It is obvious that the report of the Truth Justice and Reconciliation Commission is unlikely to be implemented in the near future. Nevertheless, there is nothing to prevent localised units such as counties, especially in places that have been hard hit by electoral violence from setting up their own mechanisms for reconciliation as well as truth.

Notes

1 See for instance, Human Rights Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya* (New York: Human Rights Watch, 1993); Mwangi Kagwanja, *Killing the Vote: State Sponsored Violence and Flawed Elections in Kenya* (Nairobi, Kenya Human Rights Commission, 1998); Human Rights Watch, *Ballots to Bullets: Organized Violence and Kenya's Crisis of Governance*, (New York: Human Rights Watch, 2008; Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, Nairobi: The Commission, 2008.

2 This is why law offers great appeal to the human rights discourse as it provides the tools for this normative evaluation. For a critique of this ethical and legalistic seduction of human rights, see generally, Meckled-Garcia, S & Çali, B (eds) *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law*. London. Routledge. 49–64.

3 David Smith (4 March 2013). Kenyan elections marred by Mombasa violence. The Guardian. <http://www.theguardian.com/world/2013/mar/04/kenyan-elections-marred-mombasa-violence>

4 See generally, Abdullahi Boru Halakhe, “‘R2P in Practice’: Ethnic Violence, Elections and Atrocity Prevention in Kenya” Global Centre for the Responsibility to Protect Occasional Paper Series No. 4, December 2013; Johannes Langer, “The Responsibility to Protect: Kenya's Post-Electoral Crisis” *Journal of International Service* 16 (Fall 2011) pp. 1–16.; Edward C. Luck, “The Responsibility to Protect: Growing Pains or Early Promise?” *Ethics & International Affairs*, Vol 24.4 (Winter 2010), http://www.carnegiecouncil.org/publications/journal/24_4/response/001.html. [Accessed 29 December 2014]

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The Circus Comes to Town: Performance, Religion and Exchange in Political Party Campaigns

JOYCE NYAIRO

From the Street Notebook

From: Joyce Nyairo<jnyairo@gmail.com>

Date: Sun, Feb 10, 2013 at 3:51 PM

Subject: Reporting LIVE from 64....

To: 

So you hear?

I must tell you about my afternoon at 64 stadium. Wajua the 6 helicopters droned around my head from 11am till 3pm when I decided to go to the rally and see for maself “what’s da fuss?”

So I woke mister up. Tukavua saa; wallet; bling bling na tukavaa ma-caps juu jua was not sunshine at that 3pm; it was solar energy, guaranteed to fry any exposed brain in seconds!

We packed at a school 800m away and enjoyed the stroll eavesdropping on Kenyans headed to/leaving the rally.

WaKenya wana time. That place was packed beyond packed. We arrived while Ngilu was wooing the crowds. But what jazzed me was not Ruto's oratory in Swa, Eng and Kale (I always knew he is an earthy and witty poet) it was the micro-economies and markets at the rally that blew me away. I had my choice of water, airtime, handkerchiefs pineapples, mangoes; sodas, ice-cream and biros. When Ruto addressed the envoy maneno, he was very clever about it. He explained what was said and what was meant.

Here is the verbatim report:

“Tunataka kuwaambia: iko shortage ya watu wajinga Kenya!

There is no difference between those who use threats and blackmail and those who use violence against the people of Kenya. They all have an agenda.

They have a stooge; a project and are using threats and intimidation. Si waseme wazi”.

The crowd was ecstatic when he asked “Uasin Gishu muko Jubilee ama nyinyi ni vitendawili?”

After that I was too bust study people wondering if they were registered voters; what their motivation for attending the rally was; their ages (ranged from 3yrs to 70+); occupations and trades. So many were listening attentively that I felt ashamed of my social inquiry with closed ears and we left soon after Uhuru started speaking cos we feared there would be a stampede by the time that whole umati emptied from 64.

TNA wana dough jo! There was a small Smart car with registration number “Women's Rep” and covered in TNA prezzy posters and Rachel Shebesh ones with Mama Nai”. As for the many, many 4 wheel drives all covered in TNA colours and posters. Who is financing this madness? The Tshirts were simply thousands. In red; in white and the yellow URP ones. Eeehhh! I had a splitting headache when we got home cos of the noise level; blinding colours and sheer energy of being in a place with so many hyper humans!

Haya, tomorrow is the debate. I am waiting to see how 6 people face off in a one hour debate with 2 anchors. Tough math! ...perhaps we shall resort to blending ethnic “traditions” with juju and innovations on borrowed Americanisms!

Be there or be square.

J

Enter the politics of money

Prayer meetings, branded helicopters, trademarked cars, music concerts, leaders adorned in fashionably tailored shirts in screaming party colours and a teeming sea of party caps and T-shirts for the electorate. These were the hallmarks of the loud pomp and material extravagance that defined the campaigns in Kenya's 2013 General Election. In the notebook entry cited above, the Jubilee rally held at 64 Stadium, Eldoret, on Saturday February 9, 2013, bore all of these markers. It was a spectacle of staggering financial muscle blended with the rhetoric of the aspirants and the quick-witted enthusiasm of crowds mingling under the unyielding heat, oblivious of the free-flowing dust that is typical of a February day in Eldoret.

The campaign rallies mounted by political parties every five or so years provide a rare crystallised moment in which we can study emerging trends in our nation's political culture against the backdrop of everyday struggles and the ways in which ordinary people loop into and out of political spaces. Sometimes the people exploit these spaces for their personal gain but, more often, they are overrun and shaped by the callous needs of the political class (Haugerud 1993:14). Campaigns may have been designed as an opportunity for potential leaders to chalk up their record in public life and lay out their promises but they have since been afflicted by the voters' need for instant rewards.

Arguably, Kenneth Matiba is the man who, in a substantial way, introduced the politics of money to the Kenyan electorate in 1979 when he made his bid for the Mbiri parliamentary seat. His opponent, Julius Gikonyo Kiano, the first Kenyan to attain a Ph.D, had been elected member of the Legislative Council in 1958, representing Central Province South. But when Matiba ran against him, Kiano's performance—his development record, which included piped water, the proliferation of Harambee secondary schools throughout Murang'a, the upgrading of many P1 teachers into Diploma holders at Makerere and infiltration of Nairobi's River Road with brisk traders from his district—signaled by the lamp (of light and progress) that was his campaign symbol throughout his political career, was quickly overlooked. Suddenly, performance in politics was about the beer that Matiba was buying and the Kshs 20-notes that voters rustled in their pockets on their way home from his campaign meetings. As word of Matiba's generosity crossed the ridges, nimble voters from Mugoiri location in Kiharu Constituency crossed the river and registered in Mbiri.¹

Commenting on the dramatic change that Matiba brought into politics in 1979, Charles Hornsby says: “Though ‘big men’ (financially and usually physically), now dominated the more developed areas, there were *local* big men and there was no automatic election for anyone except the president’s closest allies... Voters wanted leaders who would both reward them and—if necessary—take a stand on behalf of local interests...” (Hornsby 2012:343–344).

The brand of political merchandising that Matiba introduced in 1979 perhaps reached its high noon in the campaigns for the 2013 election, an election that was as much about unlikely candidates as it was about unprecedented tactics. At the launch of his new party—The National Alliance (TNA)—at KICC on May 20 2012, it became apparent that Uhuru Kenyatta was not going to spare any expense when taking his second shot at the presidency. According to David Throup, a long-time observer of Kenyan elections, Uhuru “hired a firm of British election consultants at the cost of \$16 million” even before he categorically announced his candidature.² The local press reported the TNA launch, which was said to have cost Kshs 150 million, as one filled with “pomp and grandeur... an elaborate and expensively assembled launch.”³ It was clear from then on that money was not going to be a barrier to Uhuru Kenyatta’s run for the presidency. In the last three months before the election, media sources announced that Jubilee would be spending Kshs 10 billion.⁴

On July 3 2012, when Martha Karua launched her campaign secretariat, bloggers complained that the event lacked “razzmatazz,” clearly showing their preference for glamour and goodies over issues and policy. The campaigns mounted by the rival presidential candidate, Raila Odinga, carried nearly all the same trimmings as Jubilee’s—helicopters to ferry the top brass of the Coalition for Reforms and Democracy (CORD) from one rally to another;⁵ free brand merchandise for voters, billboards, posters and flags. At the final campaign rally held at Nyayo Stadium on March 2, party supporters waved huge mock Kshs 1,000-notes bearing the portrait of Raila Odinga. Though illegal, it was a statement of intent reflecting Raila’s projected future as president of the republic. It was also a subtle criticism of Uhuru’s candidature. His father’s face is the one imprinted on official legal tender. This act of defacing it was a calculated symbolic act of regicide for it played on popularly expressed sentiments that Uhuru’s presidential ambition would amount to a return to an undemocratic order and the perpetuation of a monarchy.⁶

Romance sweeps into the theatre of the absurd

The candidacy of Uhuru Kenyatta and William Ruto was a dramatic spectacle dogged by what should have been insurmountable hurdles. First, there was the weight of pending cases at the ICC for crimes against humanity. Secondly, there was a new Constitution with supposedly clear provisions on the integrity of public officials. And lastly, there was widespread talk of the inappropriateness—nay, the unlikelihood—of Kenya stomaching another president from the populous Kikuyu community, to say nothing of a deputy from the Kalenjin community that had already enjoyed years in the highest office. Everything seemed tipped against what came to be known as the “UhuRuto” alliance (Waweru 2012).

Every good theatrical performance is based on a compelling plot and the romantic plot is never as sweet and irresistible as when it involves two star-crossed lovers—the old Romeo and Juliet formula. This template of a forbidden, unlikely, untoward, doomed romance is precisely what the coming together of Uhuru Kenyatta and William Ruto represented in the public imaginary. That they had once worked together in 2002 only added to the magic of their (re) union because within five years, their KANU partnership had degenerated into the outright Kikuyu versus Kalenjin war that was at the heart of the 2007 post-election violence (PEV). Re-establishing their old bond seemed impossible, but it also carried a hint of an enchanted wish whose charms could, hopefully, rub off on their many adherents; for there were so many whose fortunes were tied to its possibility.

A reunion between Uhuru and Ruto was the promise of a new phase of calm in the decades old tumultuous Kikuyu-Kalenjin relationship. That relationship has undergone several unions and fractures: alliances between Jomo Kenyatta and Daniel arap Moi for the resettlement of Kikuyu peasants; backroom attempts by sections of the Kiambu elite to block Moi from succeeding Jomo;⁷ Attorney General Charles Njonjo’s support which ensured Moi’s smooth ascension to power after Jomo’s death; the ousting of Njonjo and the old guard in the msaliti affair of 1983; witch-hunts, sell-outs, “land clashes” and a Kikuyu siege mentality in the Moi years which finally ended in Moi’s maneuvers within the ruling party, KANU, to hand Uhuru Kenyatta the party’s presidential ticket in 2002. In the face of this history, a new opportunity for Kikuyu-Kalenjin unity was not a complete impossibility. Neither was it a new deal. But given the scale

of the 2007–2008 conflict, it was a story with compelling intrigues and enchanting possibilities.

When Prime Minister Raila Odinga formed an alliance with Vice-President Kalonzo Musyoka, another unlikely act opened in the theatre of absurd politics. With the ODM-K party in hand Kalonzo had stormed out of his alliance with Raila Odinga, William Ruto, Najib Balala, Musalia Mudavadi, Charity Ngilu and Joseph Nyagah in 2007 following a rally in Tononoka, Mombasa, where Raila was endorsed as the party’s presidential candidate. Kalonzo’s decision to run for the presidency was seen by some as the jinx that jeopardized Raila’s chances, leaving him within a hare’s breadth of Kibaki’s contested win. In the violent aftermath, Kalonzo quickly struck a deal with Kibaki and was appointed Vice-President as an outraged Raila stood firm demanding his victory.⁸ How could these two sworn enemies, Raila and Kalonzo, now claim to have found a new affinity for each other?⁹ Their ill-fitting convenience was betrayed in their official campaign posters, which showed a smiling Kalonzo (lagging) behind a jovial (marching) Raila. In yet another pose Kalonzo was seen, not just standing behind Raila, but looking aside with shoulders turned left, as if not sharing the vision of Raila who is looking straight ahead. Their bodies were carriers of many meanings. They were not *bega kwa bega*, standing in unity and trust in the way UhuRuto were photographed, each with his arms crossed their shoulders touching, in a cheeky schoolboy pose. Crossed arms suggested not just relaxation and comfort with the task ahead, but a marking off of territory, as if they would not allow anything or anyone to penetrate their circle of trust. In all their posters, even with the rest of the “digital team”—Charity Ngilu and Najib Balala—the illusion of bodily contact between UhuRuto was deliberately created to ooze camaraderie, to signal the spontaneity of their peace pact as a credible affinity that they would infuse in their respective communities.

With these compelling optics UhuRuto turned on the charm as CORD and NARC-Kenya went on the offensive, warning of a dreaded return to KANU-type dictatorial days and the baggage of an ICC-indicted leadership.¹⁰ With varying degrees, all of the presidential candidates exploited many elements of contemporary theatre practice, mounting a deft improvising travelling theatre whose stage was never a static site but was diffusely and multiply spread out across streets, markets, televisions, computers and hand-held devices. This intermedi-ality amplified the urgency of the high stakes and suddenly, the campaign plat-

form was not something you stood up and physically went to, it came to you. In your house, in your pocket, on the street, there was no escaping the feverish tempo of the search for votes.

From the “Reporting Live from 64...” notebook entry above, we see how attempts to stay out of town and nestle at home with all devices switched off came a cropper given the volume of the helicopters crisscrossing the town all day as the leaders moved from Kapsabet to Kabarnet and back to Eldoret using this accelerated transport to make the most of their visit to the vote-rich North Rift region. Deciding to go out and bear “live” witness to the events rocking the day becomes an act of participatory theatre in which an audience is never complete until it agrees to become a part of the staged performance. At the rally, there is more than one performance being staged—that which constitutes the political meeting and that which entails a study of the people who attend these meetings and their varied motives. Deciding to tune out of the rhetoric on the stage and to focus instead on unpacking the gathering of listeners is as much an act of protest as it is a signal of middle-class snobbery. It is the same snobbery described in the sartorial preparations made before going out to 64 Stadium. Jewelry, watches and wallets are left behind, suggesting that political rallies are layered sites of treachery and theft in which the middle-class cannot hope to emerge untainted. Observing, rather than participating induces shame, the shame of being a noticeable snob and the shame of realising just how attentively subordinates listen to their leaders.

But, perhaps, knowing that there is always a gap between the words that they utter and the lives the people lead, the leaders dangle material promises of the future. The caps and T-shirts that are readily distributed in the crowds at campaign rallies are more than costumes for the show; they are the bait that enjoins these audiences in the enactments on stage, building affinities within the crowd and persuading those assembled that they share all, even the affluence of the motorcade of branded vehicles, with their leaders. The affinities generated by these branded T-shirts should never be under-rated. Yukon News, an online news outlet reports that on November 25, 2007, 15-year-old Laban Githaiga was beaten and dumped in Kibera’s Laini Saba. Police found him “unconscious, beside the railway tracks...His skull was crushed and a few of his limbs were dislocated. His blue PNU shirt was ripped off his body.”¹¹ He died in hospital two days later. His attackers had, seemingly, read his act of wearing a PNU T-shirt in “a Raila zone” as an act of provocation.¹²

On the morning of the last 2013 campaign rallies, March 2, a Nairobi-based journalist sent me a text message saying of Jubilee: “We have never seen anything like this. Nairobi is a sea of red T-shirts. They are throwing them from moving vehicles and people are scrambling. Two posh ladies packed at Serena and ran across [to Uhuru Park] to pick T-shirts, caps.” Filling the cityscape with its party colours was clearly meant to intimidate TNA’s opponents. It was more than laying stake over an area; it was tantamount to flying the flag of victory. When CORD supporters started streaming into Nyayo Stadium, they carried with them anything orange that they could lay their hands on. There couldn’t have been a single orange left in the stalls of Wakulima market! Beside TNA’s dove of peace, these fruits became a symbol of Raila’s rallying call of redistribution and equitable sharing of resources. In short, a sweeter life!

Speech acts and allied dances in the street

Since the 1974 debut of cinema adverts by Stephen Kiragu Kabuitu, election campaigns have increasingly exploited electronic media with a lot more finesse, frequency and sway.¹³ The exponential spread of broadcast media, technological developments in the production of broadcast material and the rapid rise of varied, even hand-held, digital media platforms have combined to give volume and visibility to old strategies of persuasion such as praise songs and party symbols.

Because “popular artistes are masters in the art of communicating with their audiences, politicians often borrow from their repertoire, sometimes going so far as to become performers themselves, in a bid to win the battle to represent others” (Nyairo & Ogude 2005:2). Following on NARC’s 2002 success in piggy-backing on the song “Unbwogable” to defy Moi’s succession project, the 2007 elections were defined by imitations of this strategy. Kibaki’s PNU picked “Banjuka” by DNA (Dennis Kaggiah) and fell flat on their faces with it, failing to find a resonance that would be translated into political discourse in the way the idiom *Unbwogable* came to represent resistance and to speak of the many conditions of oppression that the people had had enough (*ibid.*). The giddy call *banjuka*, meaning “dance”, did not gel with Kibaki’s personality, or match his age. The song’s hook, “Naweka shida chini, natupa mikono juu” (*I put down my problems and raise my hands*) did further damage by suggesting that people’s lives were full of unresolved problems—and yet it was the Kibaki regime that had been holding the reins of power! So Kibaki was responsible for the growing grief

and angst? The solution in “Banjuka” is, drop all your troubles and lose yourself in a giddy dance and carefree sex.¹⁴ Even in a country reputed to have a tyrannical number of youthful voters, was this really the image that a 75-year-old incumbent needed in order to win an election?

In 2013 there were, once again, attempts to use popular song to woo the people. Entertainment writer John Muchiri reported: “One of the highest paid musician [sic] in the ongoing campaigns is Charles Njaguar, popularly known as Jaguar, who is riding high with his hits Kigeugeu and Matapeli.”¹⁵ According to Ogopa DJs, his record label, Jaguar was earning Kshs 500,000 every time he turned out for a Jubilee rally. The amount was more than double the going rate for live appearances. There were claims that Jaguar had been paid a Kshs 5 million retainer to ensure he would not perform for other presidential candidates. Once again, politicians had stormed the economy changing the profile of expectations and altering the market for various goods and services. Some of the musicians who had expressed interest in various elective positions were absorbed in the secretariats of various parties, subsuming their political ambitions but raising their *celeb* profile. Ringtone, aka Alex Apoko, pulled out of the Dagoretti North race to join Jubilee’s youth and creative department. Production houses made a killing from recording party jingles and videos, many of which showed off the skillful dancing of the candidates far more than they communicated the party’s ethos. The music video for the official Jubilee campaign anthem, “Pamoja” by Juliani featuring Elsie, was especially predictable in its aping of the bulk of hip hop music videos which invariably focus on selling women’s bodies instead of their ideas.¹⁶ Why was the image of a dancing Charity Ngilu repeated so many times when Najib Balala was never shown gyrating and there was only a fleeting glance at Uhuru and Ruto rocking at some campaign rally?

Various organisations, including the Independent Electoral and Boundaries Commission (IEBC), mounted initiatives to campaign for a peaceful election. All of them hired musicians as compelling youth ambassadors who could effectively spread this gospel of peace before, during and after the ballot. No campaign rally was complete without a full cast of popular musicians. No genre was left out. Kapuka, genge, gospel, benga, mugithi—all of them found and shared space with politicians on the campaign trail. Juliani, Maddtraxx, Size 8 (Linet Munyali), John De Mathew, Mungai wa Njoroge, Makadem and many others performed.

Jubilee picked Big Ted Kwaka to head their creative department and act as the MC at all of their major events. CORD retained John Kiarie (popularly known as KJ) of the famous Redykulass trio of comedians. Kiarie ran in Dagoretti in 2007 and again in 2013 on an ODM ticket. At the last campaign rally at Nairobi’s Nyayo Stadium, ODM’s Otieno Kajwang, aspiring for the Senate seat in Homa Bay led the immensely popular chorus “bado mapambano.” A full-fledged concert, including comedians and acrobats, was on offer for the early arrivals. Similar entertainment, perhaps, on a larger scale, was on offer at Uhuru Park. Watching the events on television from Eldoret, I sent the following email to a friend who was already in his village waiting for the vote on Monday:

It’s amazing the kind of programme they’ve put together for guys who arrived at the park from 7am on.

Nyayo Stadium also very colourful. Just heard blasts of Bob Marley’s “I’m on the run ...fire, like lion in Zion”! The crowds are amazing for their numbers, elation and energy!

Will tell you about the grand entry of the hopefuls into the park and the stadium.

The choice of Bob Marley and other international leaders in songs of protest may have been a way of steering away from ethnic politics. In July 2012 some ethnic songs had come under the scrutiny of the National Cohesion and Integration Commission (NCIC) and some musicians were charged in court.¹⁷ NCIC expressed “concern about the role of popular music in mobilising political support based on ethnic identity” (Nyairo 2012). But NCIC may have failed to separate literary taste from criminal justice—“to differentiate between dangerous talk to plot murderous intent against a specified group and repugnant chatter” (*ibid.*). The cases eventually fell through but even whilst they were pending in the courts, ethnic musicians were strategically welcomed on the campaign platform. Where they were absent, MCs worked from pre-recorded mix tapes. Popular wisdom held that parties needed to show up their ethnic diversity by introducing the members of their coalitions onto the stage with an emblematic ethnic song. Thus CORD’s Moses Wetangula would be ushered in with a fast-paced *lipala* jig to which he and Boniface Khalwale would jive with a skill to match that of any professional dancer! Likewise, Big Ted would order a *taraab* tune from the DJ before handing the microphone over to Najib Balala of the Republican Congress that was part of Jubilee. These attempts to show broad

representation were geared at engendering inclusivity in the audience and painting rival parties—like the anemic Safina which fronted lawyer Paul Muite as its presidential flag-bearer—as undesirably insular.

Antics involving persuasive voices were not limited to the musicians on stage. Political leaders deftly employed dramatic and rhetorical devices to sway their audiences. At 64 Stadium, Ruto adopted the format of popular street preachers, niftily translating his text from Kalenjin to English and finally to the emotive language of national unity, Kiswahili. In the short excerpt of his speech narrated in the street notebook entry above, Ruto poses as the national translator. His acknowledgement of what Haugerud has termed “possible gaps between lines spoken and lives lived” is both humourous and ironic (*ibid.*:14). It is humourous because his code switching from Swahili to English deflates the decorum with which matters of international diplomacy are ordinarily handled. Ruto addresses himself to the foreign envoys of the “choices-have-consequences” persuasion. His message to them is plain: “There is no difference between those who use threats and blackmail and those who use violence against the people of Kenya. They all have an agenda.” With no indication of irony, Ruto equates the crimes UhuRuto face at the ICC on the same level as the alleged blackmail of the envoys. Refuting the rhetoric of hypocrisy—that gap between saying and living—was in actual fact the motto of Ruto’s URP: *kusema na kutenda*.

From the realms of sustained irony, Ruto’s oratory seamlessly shifts to synecdoche, as he ridicules UhuRuto’s opponents. “*Uasin Gishu muko Jubilee ama nyinyi ni vitendawili?*” By asking the people of the county whether they are riddles, Ruto is referring to Raila— not by acknowledging Raila’s famous entertaining prowess in using riddles—but as a tiresome conundrum that will never be solved or understood. The people’s laughter resounds across the stadium. Caricaturing Raila in this way takes what is familiar and exaggerates it so grossly as to invoke the audience’s malicious laughter (Mbembe 1997:152). Deflating the powerful—a Prime Minister and a presidential candidate—momentarily fills the crowd with the power that it rarely exercises at the ballot. Such are the ironies played out at campaign meetings—the leaders come to ask for power in the form of votes, but they exploit their elite status to dictate who the people will ultimately give that power to and so the people never really own their importance in the electoral equation. In other inversions, audiences in Kisumu turned Raila’s speech into a sermon from a holy grail, punctuating each of his edicts

such as “jumatatu...nataka murauke alfajiri,” with the reverential response of worshippers in church, “ndio Baba!”¹⁸

The power of prayer, praying for power

An old adage says, “Every campaign needs a devil”. UhuRuto found one in the name of the ICC and the “choices have consequences” foreign envoys. Equally up for this censure was the mediator in the 2008 conflict, Kofi Annan in his “increasingly unsubtle attempts to influence the election” (Waweru 2012). The brand of nationalist fervour that UhuRuto built up against this interference was, in some ways, reminiscent of the Mau Mau and the struggle for independence. Indeed, Kenya at 50 still had plenty of raw memories of colonialism concealed below the surface and ready to be woken up and driven to a crescendo of protest against perceived “puppets of the west”. If foreign envoys and the ICC were the devil, they did also provide a Janus-faced side of good for it was on account of them that UhuRuto mounted their most persuasive mobilisation weapon and winning rhetoric. Uhuru could have exploited nostalgia by linking his trial to that of his father in 1952 but he never played the ICC as a story of family victimization. It was left to other commentators to draw the analogies and craft the myth of the Kenyattas and their anointed leadership.¹⁹

If the 2002 election was won through the idiom of *Unbwogable*, the 2013 election was won by the idiom “prayer meetings”. The choice of the term “prayer meetings” to describe the series of assemblies that Uhuru and Ruto called all around the country after their return from the ICC in December 2011 signaled their awareness of the massive spread of the Pentecostal-Charismatic movement. Over the last 30 years a grammar of “born-again” or “saved” Christians involving practices of Bible study groups in churches and residential neighbourhoods; night-long vigils known as *keshas* and, lately, gospel music concerts has grown apace with the explosion of evangelical churches. “Christian religious discourse is truly the new ethnic in Kenya. It is no longer a matter of faith, it is a way of life, fully integrated into every aspect of our everyday lives” (Nyairo 2013:94). Richard Dowden underlines this assault of Christian discourse saying, “Africans seem naturally networked to religion. All meetings—on politics, sport and even business—begin with a prayer. God is invoked on every occasion, private or public” (2013). Ruto, in particular, had great ease and comfort in using the discourse and modes of worship made popular by the evangelical churches

because he had come up the ranks of national leadership via the Christian Union movement at the University Nairobi where he studied between 1987 and 1990.

The grammar of these churches is aggressively tied to notions of social change and (self) improvement. Class mobility through religion is real. “[I]nvolvement with modernity goes hand in hand with new enchantment, rather than disenchantment of the world” (Meyer 1999). In colonial Kenya, converting to Christianity translated into access to education; modern clothes; a modern house—perhaps with a corrugated iron roof; a water tank and maybe even a bicycle. As the recent spate of Kenyan autobiographies has demonstrated, these benefits transformed the lives of ordinary villagers into ones of national envy.²⁰ What may once have been available to only a select privileged elite became the goal of the majority. So when a freshly indicted UhuRuto returned from The Hague in December 2011 and sought the intercession of the people in praying for a just resolution to their plight, they tapped into a very widespread and commonly sought discourse of enrichment, forgiveness and redemption. In Christian ethos, the focus of wrong-doing or sin is not criminal justice, it is salvation. Ironically, the roots of our current criminal justice system lie in colonial order rather than ethnic judicial systems, in the same way that Christianity is a colonial import. But while Christianity has gained widespread acceptance, the justice system is still regarded with suspicion as a system that favoured settlers and never worked on the side of the locals.²¹

In the week following the confirmation of their charges at the ICC, Ruto and Uhuru organised a prayer rally at 64 Stadium in Eldoret town. The choice of Eldoret—the epicentre of the 2007–2008 mayhem—was deliberate. If the people of Eldoret could be persuaded to see a new working relationship between Uhuru and Ruto, then the outcome of the 2013 election could be skewed to the benefit of the ICC charges. The Eldoret prayer rally came after a successful showing in Ruiru and before others in Meru, Tononoka and Malindi. At that time, supporters of the duo, like Kalonzo Musyoka, said they had “come to offer moral support for [their] brothers”. Attempts by *Sunday Nation* columnist Makau Mutua to demonise the Kikuyu-Kalenjin-Kamba alliance dubbing it KKK to liken it to America’s racist Ku Klux Klan failed because in Kenya, the only logical parallel for America’s white extremists may be the colonial and jet set expatriate cliques commonly known as KCs (Kenyan Cowboys) and these were not a factor in the Uhuru, Ruto and Kalonzo equation.

At that February 2012 Eldoret prayer meeting, Ruto quoted a verse from the Bible illustrating triumph over enemies. He likened it to the case facing him at The Hague. Commentators saw through the ploy of Uhuru and Ruto praying together and declared that, “The narrative of the meetings has been the push for a unity pact to stop Prime Minister Raila Odinga from succeeding President Kibaki. In doing so, the accused have resorted to hyperbole and hysteria into which their respective communities have been drawn” (Gekara 2012). Other critics, like the then Justice Minister Mutula Kilonzo, questioned the inverted logic of praying for the suspects rather than for the “voiceless” victims of the violence (*ibid.*).

Since the success of the UhuRuto alliance at the election, many political analysts have rushed to lay claim to the strategy of uniting Uhuru and Ruto in the aftermath of 2008. Bishop Cornelius Korir of the Catholic Diocese of Eldoret, a man “who did much to reconcile communities in the aftermath of 2007–8” came out in support of the duo (*ibid.* Waweru 2013). His role in the initial mediation between Uhuru and Ruto can be inferred from the fact that barely two weeks after their April 9, 2013 inauguration at Kasarani Stadium, the new president and his deputy—accompanied by their wives—attended a mass at Eldoret’s St. John Cathedral, which was officiated by Bishop Korir.

If UhuRuto won the hearts of many by posing their personal problems as everyday human struggles—as the Calvary that we all endure on the long road to Canaan—they were certainly helped by more than the people’s faith. The carnival atmosphere that attended to every prayer meeting—and the prayers that became an indispensable part of every rally once they had declared their candidature—added intoxicating fuel to their fiery campaign. The religious leaders who officiated at these meetings were as colourful as the musicians who rocked the stage and the politicians who turned out day after day in fashionable specially designed clothes in party colours. The colours played up the unity bond and the gospel songs provided the sonic affirmation of a shared destiny. At these carnivals there was a fluid collapsing of boundaries and a transactional ethos that defied all known parameters, steadily building into a bizarre kind of reality theatre. In the provision of sound, lighting and stage equipment at the rallies, musicians and entertainment companies found themselves edged out by politicians and churches. Churches have hefty investments in sound equipment.²² When Bishop Margaret Wanjiru of the Jesus is Alive Ministry made a

bid for the Starehe parliamentary seat in 2007, her massive congregation and her considerable resources became indispensable in ODM. In the 2013 campaigns when she vied for the Nairobi Senate seat, she was said to be the one supplying all stage equipment for the CORD rallies.

The question of the suitability of gospel music for the political stage was never once raised. UhuRuto had kicked off their campaign as a plea for Christian charity. It seemed logical, therefore, that songs of worship should be a part of their repertoire. As campaigns for the elections kicked off in earnest, other candidates found themselves inevitably drawn to this genre precisely because it is now such an indelible part of the local music industry, dominating the night-life in secular nightclubs and pubs; diffusing like wild fire from the confines of the church to secular studios, broadcast media, banking halls, elevators, *matatus*, cellphone ringtones, simply everywhere (Nyairo 2013). The lines between the secular and the spiritual have been wiped out. First, religion competed with global consumer practices for the financial and cultural allegiances of the people. Now it was actively determining the nation's politics.

“Kuuza sura, [ha]wataki kuuza sera”: What didn't they sell?!²³

The modern day campaign rally is a site of many transactions. Whether you arrive at the venue hours before the event kicks off, or you get there in the thick of things as speaker after speaker takes to the podium, the place is a thriving marketplace of diverse wares and garrulous traders. As seen in the street notebook, there is the relevant fare of bottled water, juices and sodas that you would expect to be on offer to relieve audiences from the scorching sun. But alongside these edible goodies, which include ice-cream, biscuits, mangoes, pineapples and water melons, one finds seemingly irrelevant wares such as exercise books, pencils and biro pens of all shapes, lengths and colours. Business is brisk and voluble traders seem to provide anything one might remotely think of needing—scratch cards for airtime, handkerchiefs, batteries, torches, even plastic containers! Out on the field in the thick of the audience, these commercial exchanges appear to be the real business of a political rally.

The bulk of the transactions at a campaign rally have little to do with the exchange of ideas that should be at the heart of a meeting where serious, rather than playful, reflections on the incumbent government ought to be made and the party's policy pronouncements should be communicated to underline its suita-

bility. But instead all manner of commercial transactions are at work between politicians, musicians, religious leaders and enabling brokers. The rhetoric of rallies is met with a varied mixture of full attention from the audience, raucous laughter, booing and jeering, somber listening, merchant and other performative sideshows.

To intervene in this slippery atmosphere of entertainment, casual sparring between opponents, ethnic incitement and blatant merchandising, the media actively engaged its role as the people’s watchdog and intervened to bring issues and ideas to the heart of the contest through the first ever televised presidential debate. The debates were held at Brookhouse International School in Nairobi. The first one was on the night of February 11, 2013 and was preceded by a minor side-show in the form of Paul Muite moving to court to demand the inclusion of all presidential candidates rather than the staging of a contest between the presumed hot favourites. Muite’s intervention proved to be critical. By the end of the first debate, a little known candidate Mohammed Abuduba Dida had won the hearts of social media wags by grounding the debate in earthy common man experiences.²⁴ When Peter Kenneth of the Eagle Alliance impressively cited statistics on education and healthcare nobody, not even the anchors, questioned his sources. It was as if numbers in and of themselves are facts.

On social media, opinion was sharply divided on who the winner of the first debate was but it was, without doubt, a rare moment in which Kenyans were given the opportunity to listen to all the candidates at a forum that was devoid of the sonic and colour-filled distractions that define rallies. At some point in the second debate held on February 25, the ICC question threatened to deteriorate into a mud-slinging contest but Paul Muite saved the day. The other explosive subject was the land question as Martha Karua, Musalia Mudavadi, Raila Odinga and Peter Kenneth appeared to gang up on Uhuru Kenyatta.

These televised debates and published manifestos were the only serious forum through which political parties kept to issues and moved away from selling their prowess on the dance floor. But one cynical commentator dismissed the ‘cut and paste’ glamour of the glossy manifestos saying:

Read any of their manifestoes and you are left to imagine a Garden of Eden. There will be free secondary and university education; a fully stocked referral hospital in every county; a pension scheme for everybody over 60; a national health insurance scheme for every Kenyan; cash transfers to the urban poor. Holy Lord, the list is endless.

Any intelligent person can see the manifestoes are most unrealistic. They are a total waste of time to read, and a total waste of money to print. You don't need to be an economist to see the extravagant promises they are making have a total disconnect with the reality of our economy.

The political candidates want to imagine that these fantasy printouts are the answer to the public demand for "issue-based" campaigns ...Talking issues is about explaining cogently how you will pay for the largesse...

Another pledge to invest 2.5 per cent of GDP in research and development similarly went beyond the roof of known global levels. Worse, it was not clear where the R&D was going into: money transfer technology? Animal husbandry? Fisheries?

The Jubilee coalition plans to unveil its own manifesto today. You can rest assured it will be another make-believe tract. Don't bother reading it.²⁵

How can Kenyan politics be steered away from the blitz and extravagance that peaked in 2013 adding to the list of dubious considerations such as ethnic brokering that have thus far shaped Kenyan politics? In 2013, religion was exploited in ways that had not been seen before. There was plain gullibility of voters in the face of nimble orators and there were outright ethnic considerations of gain—whether that gain was the security to remain in contested lands or the promise of redistributed wealth and the end of "marginalisation" by the state—accompanied by disillusionment with the reform brigade and its showing in the *mseto* government. Rhetoric was long and intense, but nowhere was there compelling evidence of the capacity of the aspirants to address the country's yawning needs. Marking the gap between what needed to be addressed and what was being offered, the popular musician Juliani (Julius Owino) spun humorous poetry as he sang: "Ufisadi, ubinafsi, ukabila; kuuza sura, wataki kuuza sera". Ultimately, the dynamics of the 2013 campaigns were a full-fledged study on "the constitutive and political nature of representation itself;... its complexities; [the] effects of language; [and] textuality as a site of life and death" (Hall 1992:285).

Conclusion

Whether or not, once again, one believes that Raila Odinga was robbed of victory at the 2013 polls, the question still remains: why didn't his message of a promise to redistribute resources between communities carry the day resoundingly across the republic? Why was he not overwhelmingly seen as the solution to the violent aftermath of the 2007 General Election? Why, at these 2013 polls,

was Martha Karua’s commitment to justice at the ICC dismissed with such contempt, earning her—a national leader with 20 years’ experience in Parliament—far less votes than many of the women’s representatives garnered in their respective counties? Can religion be used to circumvent justice?

Students of political persuasion argue that it is possible that “effective leaders may be effective precisely because of their ability to select the right message and so say the right thing at the right time” (Dewan, Macartan & Rubenson 2013:285). In the 2013 elections, the content of the message mattered. Campaign rallies may be a circus of various acts of gaiety and commerce but there is little doubt that in going round the country addressing crowds, each of the leading candidates came to be associated with a particular cause. And that cause was invariably tied to the candidate’s past. Uhuru and Ruto were able to persuade significant blocks that theirs—rather than the reordering of the political economy that was promised by Raila—was the best chance at peace and unity. By switching parties and finding new colours, slogans and content, they earned the benefit of novelty. They appeared to have a cogent public relations team that exploited optics much more strategically while their strongest rival, Raila appeared to be “lumbering under old colours, grudges and complaints, never taking responsibility for any problems in Kenya, just blaming others.”²⁶

The final outcome dealt a blow for the criminal justice system, Martha Karua and all who stood steadfast by this notion that “wrong-doing” must be punished. Uhuru and Ruto turned this idea of “wrong-doing” into much more than repeated pleas of their innocence. They turned it into a lasting solution, purportedly guaranteeing the peace between their respective communities. The discourse of “born-again” salvation was a powerful ally and it propelled their message with a currency and resonance that was readily available to many. Religion doesn’t persuade. It compels. Acts of persuasion in the 2013 campaigns may, indeed, have hinged a lot on the politics of money, the charm of ethnic unity and the charisma of young(er) leaders but more than anything else, the victory belonged to religious discourse—a marker of socio-economic mobility and the new ethic around which assembly and commerce are happening. To change this culture of politics we would have to do more than legislate and monitor limits for campaign funding. We would have to change the entire nation’s moral compass, its fixation with wealth and status and the value it ascribes to performativity, including religious displays.

Notes

1 Kiano's water projects were being mocked in more ways than the slogan that Matiba coined: "*maai ti iria*", water is not milk! It was said that serious Matiba supporters were being rewarded with "brand new cars complete with fuel and logbooks" (Kiano and Thatiah 2013:262). Kiano responded by citing his development record and spread the adage "*unene nduguragwo na mbeccu*" (leadership cannot be bought with money). Still, Kiano who had garnered the highest votes in the country in 1974—beating his closest rival by over 19,000 votes—lost by 3,500 votes to Matiba who run off with 20,100 votes.

2 See David Throup (2012) on clientage, ethnic particularism and political alliances in the 2013 election.

3 <http://www.standardmedia.co.ke/?article-ID=2000058546>.

4 <http://www.the-star.co.ke/news/article-101699/uhuru-spend-sh10-billion-campaign> By contrast, other presidential candidates such as Prof James ole Kiyiapi were said to have a budget of 500 million shillings while Martha Karua repeatedly stated that her party, NARC.

5 It was reported that political parties were spending as much as 10 million shillings a day on the hire of helicopters. (get link from email)

6 At a CORD rally held in Kakamega on March 2 2013 Cyrus Jirongo was forthright in instructing the crowd to "angusha kijana ya hayati Jomo".

7 See Jeremiah Kiereini (2014:179) for a discussion of the "change the constitution" group and how it was vanquished.

8 According to Raila, Kalonzo had started negotiating with Kibaki and PNU long before he abandoned them after Tononoka. "The idea was to split ODM-Kenya so that PNU could work with Musyoka" (2013:750)

9 In *Peeling Back the Mask*, Miguna Miguna describes Raila's loathing for Kalonzo, saying that Kalonzo vainly coveted the position of president, claiming that his mother, a seer, had predicted that he, Kalonzo, would one day be president.

10 Of the other six presidential candidates, Martha Karua of Narc-Kenya was the most vocal in playing the ICC card to bar or otherwise delegitimize the UhuRuto alliance.

11 <http://www.yukon-news.com/sports/a-death-in-kibera-during-the-election>

12 Raila represented Langata Constituency between 1992 and 2013 and his stronghold there was Kibera.

13 Kiragu's advert aired in cinema halls after the routine Kenya Newsreel and before the trailers and main feature. It was no more than a picture of one of his posters and a voice-over saying "Vote Kiragu Stephen..." There may have been a few other candidates similarly using television as a campaign outlet but my memory has remained hinged on Kiragu Stephen's pitch perhaps because in those days it was very rare for people to introduce or otherwise refer to themselves surname first, before "Christian" name. That practice, which begun in the 1990s is now widespread and was likely fashioned from the University of Nairobi's admissions system although the university always placed a comma after the surname.

14 The lyrics focus of the behavior of young men and women out on a night in the town, the man boasting his prowess and his conquests:

*mi niko tayari ku-ba-ba
kujibamba vi-nasty na kuchanganya msichana kiasi
nimguse pale nimwulize anaskiaje
leo hatukukutana niaje
nishikamoo,
marahaba*

*nikimshika more nimarahaba
tukianzakazi mi naye n ikinyume
anageuka maji mi nageuka chuma*
Available at: <http://www.ghafila.co.ke/lyrics/d/133-dna-lyrics/596-banjuka-remix>

15 <http://zuqka.nation.co.ke/news/local-artists-bask-in-the-glory-of-campaign-windfall/>

16 https://www.youtube.com/watch?v=h09S0_9MS8s

17 The three musicians were Kamande wa Kioi, Muigai wa Njoroge and John De Mathew. Available at: <http://www.nation.co.ke/News/politics/Musicians+charge-d+with+hate+speech/-/1064/1444008/-/15pw6q6/-/index.html>

18 'CORD last rally in Kisumu-2013 election'. Available from: <https://www.youtube.com/watch?v=T63OwA-Dx5f4>

19 <http://kenyaupdatetoday.blogspot.com/2011/04/mama-nginas-sense-of-deja-vu-59-years.html>

20 For a further discussion of this trajectory see 'Portraits of Success: Common Trends and Uncommon Valor in the Crafting of Self and Society in Recent (Auto)biographies' in Kenya@50: Trends, Identities and the Politics of Belonging, Joyce Nyairo, Nairobi, Contact Zones, pp.146–171.

21 I am grateful to Alfred Nyairo for this exposition of his 30 year experience in the legal profession.

22 See Nyairo 2008 for a discussion of the economies of the charismatic faiths and their acquisition and transformation of commercial sites such as warehouses into spaces of sacred worship.

23 Juliani, 'Utawala', 2013.

24 Dida polled a surprising 52,848 votes, humbling old political players like Martha Karua (43,881) and Paul Muite (12,580) and spiking the much-touted highly educated Prof. James ole Kiyaipi (40,998).

25 Gitau Warigi, 'I doubt leading candidates believe in the contents of their party manifestoes', *Sunday Nation*, 5 February, 2013 p.13.

26 After the verdict of the Supreme Court on March 30, an 18 year old Kenyan girl explained to me why she would never have voted for Raila if she had been in the country and a registered voter at the time of the ballot.

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The Geopolitics of International Justice: ICC and Kenya's 2013 Presidential Election

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Introduction

On September 21, 2012, three months after her appointment as the Prosecutor of the International Criminal Court (ICC), Fatou Bensouda outlined her vision for the court during a public event at the American Council on Foreign Relations. She drew attention to the creation of ICC as having 'introduced in contemporary international relations...the new paradigm of international justice.'¹ The court, she said, 'added an independent and permanent justice component to the world's efforts to achieve peace and security.'² Slightly over a decade after the Rome Statute entered into force on July 1, 2002, the ICC's new paradigm of international justice has turned the institution into a pivotal actor in geopolitics now redefining a new approach to international relations and setting the contours of global governance. However, the return of the Cold War era power struggles has radically changed the geopolitical context in which the ICC is operating. As Richard Falk rightly argues, the new form of geopolitics is threatening to dethrone the old paradigm of a hard power, West-centric world.³ The West is resisting the new geopolitics, which is still struggling to displace the old geopolitics. As such, the ICC is caught up in the new geopolitical struggles for global hegemony in the 21st century between the West and the emerging BRIC powers (Brazil, Russia, India and China) in global governance. In its editorial

line, in May 2013 *Russia Today*, Russia’s flagship international news channel, declared that ‘the International Criminal Court is being used as an instrument to carry out regime change with a smokescreen of human rights protection’.⁴ This line was echoed by the *China Daily* and the China News Corporation (CNC). Slightly more than a decade after its establishment, the ICC was characterised as ‘the nastier manifestation of globalisation’⁵ and a spearhead for the West’s efforts to reassert its global hegemony in the new multipolar world.

Within some African countries, the initial support to the ICC as an independent and impartial instrument of international justice appeared to wane, giving way to what one may consider to be open hostility and even brazen resistance to its forays into the continent. As the Ugandan scholar, Mahmoud Mamdani rightly observes, since its creation, the ICC has danced to the tunes of Western states.⁶ More withering criticisms of the court seem to have depicted its role as that of ‘imposing selective justice of the West against the rest.’ Because of its almost exclusive focus on Africa, African Union leaders have accused the court of ‘race hunt’⁷ almost echoing the court’s critics in the West who have likened it to ‘Europe’s Guantanamo Bay for Africa.’⁸ A radical critique articulated by Rwandan President Paul Kagame, among others, sees ICC as a harbinger of a new form of ‘multilateral imperialism,’ a subtler upgrade from slavery, colonialism and imperialism.⁹ Although the court draws its ultimate power from the United Nations Security Council, the selective application in Africa of Articles 13(a) and 16 of the Rome Statute, that give the Council “prosecutorial” rights to refer or defer an ICC investigation and prosecution, has undermined the sovereignty and stability of African states.

It is against this backdrop of acrimony over the ICC’s role in new geopolitics that Kenya became one of the 22 cases in nine situations—all without exception in Africa—that were brought before the court. The other countries were: Uganda, the Democratic Republic of the Congo, the Central African Republic, Mali, Sudan, Libya and Côte d’Ivoire. Kenya’s encounter with the ICC began on December 15, 2010 when the then Prosecutor, Luis Moreno Ocampo, announced that he was seeking summonses for six prominent Kenyans¹⁰ who allegedly committed crimes against humanity during the 2007–2008 post-election violence that left some 1,133 people dead, thousands maimed and more than 300,000 others displaced. The decision by two ICC suspects, Uhuru Kenyatta and William Ruto, to run for Kenya’s presidency during the March 4, 2013 election on a joint-ticket posed a serious dilemma to the court and its prompters in

the West. From an instrument of international justice, the ICC quickly morphed into a veritable pivot about which the election came to revolve.¹¹ In February 2013, U.S. Assistant Secretary of State, Johnnie Carson, sensationally warned Kenyan voters that “choices have consequences,”¹² a clarion call quickly taken up by European Union diplomats in Nairobi. The diplomatic dilemma deepened after the two beat the odds and won the contest with 50.07 per cent of the total votes cast, more than 800,000 votes over the candidate perceived to be preferred by the West, Raila Odinga.

The victory was upheld by the country’s Supreme Court. In this context, it has been surmised that the ICC and the West could have won the election for President Kenyatta and his Deputy, William Ruto. Internally, the victory was widely interpreted as a referendum and a vote of confidence for Kenyatta and Ruto in their battle against the ICC and the West. The ICC factor in the Kenyan election stridently pushed the country towards a new assertive and Africa-centric path in its international relations. Regionally, Kenyatta and Ruto took the battle to the East African region and continental front where the ICC was already discredited as a tool of neo-colonialism and a threat to Africa’s security and stability. During Kenyatta’s inauguration as Kenya’s fourth President on April 9, 2013, Ugandan President Yoweri Museveni praised the Kenyan voters for rejecting the blackmail by the ICC and upholding the sovereignty of Kenya.¹³

Kenya’s assertive diplomacy was bolstered by a new geopolitical context linked to the decline of America’s unipolar position in the global political space, the significantly reduced influence of the World Bank and IMF¹⁴ as instruments of the West-dominated global financial system and the new challenge by emerging powers, particularly Russia, Iran and China, which offered African countries alternative sources of capital, markets and allies in defence of their sovereignty.¹⁵ This chapter explores how Kenya’s role in the ICC changed and the geopolitical context in which the court shaped the future of power as the pivot of the 2013 election. Finally, it examines how the court’s policies influenced Kenya’s new approach to international relations. The chapter argues that a perceived threat to Kenya’s stability and sovereignty by the ICC actions radicalised the country’s foreign policy, turning it into the epicentre of Africa’s resistance to the erosion of state sovereignty, security and stability.

ICC and the sovereignty question: A brief overview

Kenya played a pivotal diplomatic role during the United Nation’s backed Diplomatic Plenipotentiaries that ratified the Rome Statute that established the International Criminal Court on July 17, 1998 and which came into force four years later on July 1, 2002. It was among the countries that were given the vice-presidency of the key conference attended by diplomats and other senior officials from governments of the world.¹⁶

Minutes of a two-day meeting in Rome, Italy, in July 1998, show that Kenya actively resisted the formulation of the Rome Statute that gave untrammelled powers to the ICC Prosecutor and eroded the sovereignty of state parties to the treaty. Indeed, the then First Secretary at the Permanent Mission in New York, US, Mr. Thuita Mwangi, told the plenary that “Kenya continued to doubt the desirability of conferring *proprio motu* powers on the prosecutor, particularly because of the danger that pressure might be exerted on him or her to act or not to act, to the detriment of his or her independence”.¹⁷

Despite its reservations, Kenya ratified the Rome Statute on March 15, 2005, becoming one of the 122 state parties, including 34 African states, who are also members of the African Union.¹⁸ Ironically, on March 31, 2009 Kenya would become the first victim of the ICC Prosecutor’s *proprio motu* powers when the Court’s Pre-Trial Chamber II invoked Article 15 of the Rome Statute authorising the prosecution to investigate the situation in Kenya.¹⁹

As soon as it came into force, the ICC ran into trouble with the world’s major powers over the role of the prosecutor and the doctrine of sovereign immunity. Countries like Egypt, Israel, Russia and Iran signed the treaty but declined to domesticate it. Other powers like China, Turkey, Indonesia, Pakistan and India were even more sceptical and refused to sign the treaty. Some 34 African countries ratified it, becoming the largest single block supporting the ICC.

Like with some African countries, the US initially supported the establishment of the court, and President Bill Clinton signed the treaty towards the end of his second term on December 31, 2000. However, at the end of the tenure the Clinton Administration argued that the treaty was flawed and recommended that his successor should not forward it to the Senate for ratification.²⁰ John R. Bolton, former American Permanent Representative to the UN, suggested that the United States should be mainly concerned “for the President, the Cabinet

officers who comprise the National Security Council, and other senior civilian and military leaders responsible for our defence and foreign policy. They are the real potential targets of the politically unaccountable prosecutor.”²¹ On May 6, 2002, America formally notified the UN that it would not be a member of the Rome Statute.²² The treaty was never ratified by Congress and all the administrations afterwards have adopted the same position.

One of the most controversial articles in the Rome Statute is Article 98(2) on *Cooperation with respect to waiver of immunity and consent to surrender*, which states that:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

From 2002 America sought to provide immunity to its troops serving abroad using this controversial clause.²³ It signed bilateral immunity agreements known as “Article 98 agreements” with over 100 ICC-compliant countries stating that they cannot surrender any US citizen to the ICC. America enacted a plethora of laws to shield itself from Article 27 of the Rome Statute, including the ‘American Service-members’ Protection Act (also known as the ‘Hague Invasion Act’)—which allows the US to use ‘all means necessary and appropriate’ to bring about the release of any US or allied personnel detained or imprisoned by or on the request of the International Criminal Court.

Europe, America and much of Asia are immunised against the ICC. The customary law of many European states—the real underwriters of the ICC—recognises the immunity of Heads of State. Recently, the English court held that a warrant of arrest could not be issued for the arrest of Robert Mugabe on charges of international crimes on the basis that he was a presently serving as Head of State at the time the proceedings were brought up. Similarly, in November 2007, prosecutors in France declined to charge former US Secretary of Defence, Donald Rumsfeld, for torture and other alleged crimes committed during the US invasion of Iraq, on the grounds that heads of state enjoyed official immunity.

A decade on, it appears as if only Africa is not shielded against article 27 of the ICC on sovereign immunity. With virtually all the cases currently at the ICC

focusing on crimes committed in Africa by Africans, the continent is practically the only region of the world where the sovereign immunity of leaders is not guaranteed.²⁴ As such, in October 2013, the African Union convened an extraordinary summit on the ICC, which resolved to re-introduce sovereign immunity of sitting Heads of State and government from prosecution, declaring that: ‘no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.’ This, the AU argued, is necessary ‘to safeguard the constitutional order, stability and, integrity’ of African states.

The African Union also called on the United Nations Security Council (UNSC) to reconsider Article 27 that denied immunity to sitting leaders of governments. The AU is expanding the mandate of the African Court on Human and Peoples’ Rights (AFCHPR) to try cases of genocide, crimes against humanity and war crimes while balancing between the imperatives of impunity and those of immunity.

Enter ICC: The politics of intervention

On February 5, 2008, the former Prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, announced that his office had commenced preliminary investigation of the post-election violence in Kenya.²⁵ The tragic ‘2007–2008 crisis’ shattered Kenya’s image as an island of peace in a turbulent Africa. But why exactly did the ICC decide to intervene in Kenya—one of Africa’s most stable countries with functioning institutions—and long after the guns had fallen silent? A number of opposing views compete to explain the reasons behind the ICC’s entry in Kenya.

It is plausible that the ICC’s attention was drawn on Kenya by widespread claims of ‘ethnic cleansing’ by the government side and counter-claims that the President’s supporters were ‘guilty, directly, of genocide’ by the opposition candidate, Raila Odinga and his Orange Democratic Movement (ODM). The violence in Kenya may not have attained the cataclysmic propositions of deaths in Rwanda, Burundi or the Democratic Republic of Congo (DRC), but it occurred fast and furious. By the time the conflict ended in a fragile peace deal in February 2008, it had claimed some 1,133 lives, displaced more than 300,000 people and cost East Africa’s largest economy more than 100 billion shillings (\$1.5 billion).²⁶

One argument is that the ICC intervened in response to the government's failure to implement the report of the Commission of Inquiry into the Post-election Violence (PEV)—popularly known as the “Waki Report” after the Chair of the Commission, Justice Phillip Waki, a Kenya Court of Appeal judge. Although the report was submitted to President Mwai Kibaki on October 15, 2008 and adopted by the Kenyan Parliament on January 27, 2009, the government failed twice to persuade Parliament to pass the *Special Tribunal for Kenya Bill (2009)* to try the organisers of the violence as the report had recommended.²⁷ Ironically, the bill was defeated by a medley of the most unlikely of allies across the party divide.

On the one hand was a cluster of parliamentarians linked to ODM who voted against the bill because they had no faith in the national judicial process to end impunity; on the other was an eclectic mix of MPs aligned to President Kibaki's government and ODM's Rift Valley wing that pushed for the ICC option convinced that the court's process would take a very long time. This gave rise to the poetic mantra, ‘Don't be vague, let's go to The Hague!’ Despite this, it appears that the ICC and its local and international backers were in a great hurry to intervene. As a result, on July 9, 2009, the Panel of Eminent Persons handed over an envelope with the list of suspects and accompanying material to the ICC.

The second argument is that the ICC intervention was a monumental act of betrayal of Kenya as a sovereign nation by Justice Waki, the Chair of the Panel of African Eminent Persons, Kofi Annan and a network of local elite and international actors who conspired and maneuvered to nail their political rivals and commit them to trial in an international court at The Hague. Supporters of the Hague option worked through the Waki Commission to create a legal subterfuge for the ICC to take up the Kenyan case. The move by the commission to create a “special Tribunal” superimposed on Kenya's judiciary and a recommendation authorising it *to consider referring the matter to the ICC if the government failed* to try suspects of the 2008 violence amounted to a “constitutional coup.”

In retrospect, neither the National Accord nor the Kenyan Constitution bestowed upon Justice Waki or the Commission such sweeping mandate to commit Kenya and its leaders to a foreign jurisdiction. Nonetheless, on 16 July 2009 and of his own volition, Waki handed over his Commission's Report and six boxes of documents and supporting materials and ‘a secret envelope’ containing a list of alleged perpetrators of violence to Kofi Annan, a person

without any legal status in the laws of the Republic of Kenya. Notably, Waki had neither handed over nor shared the contents of the envelope with President Mwai Kibaki, the custodian of the sovereignty of the land. He justified this decision as ‘a necessary action to beat impunity.’

In turn, Annan handed over the report, documents and the secret envelope to the ICC Prosecutor. Although Kenyans passed and adopted a new democratic Constitution on August 27, 2010, including the International Crimes Act (2009) and undertook surgical reforms of the Judiciary, the ICC and its prompters ignored it as a framework for dealing with the root causes of violence and impunity.

Third, and armed with this justification, on December 15, 2010, the ICC prosecutor experimented with the *proprio motu* clause under Article 15 of the Rome Statute and, without reference to the Government of Kenya or the United Nations Security Council, used his own discretionary powers to select six names from the ‘Waki list’ to answer to charges of crimes against humanity. This was the first time he did so since the court’s establishment. In a characteristic style of the ICC’s ‘judicial activism’, Ocampo declared his intention to ‘make Kenya an example to the rest of the World that impunity will not be tolerated.’ He was determined to use the Kenyan cases to salvage the court’s dwindled reputation internationally.

ICC: A new electoral fault line

The ICC intervention intensely radicalised Kenyan politics. On December 22, 2010 the Kenyan Parliament passed a motion seeking to pull the country out of the Rome Statute. In January 2011, the Kenyan Government launched a high-profile campaign for national trial or deferral as a ‘roadmap’ to peace and reconciliation. President Kibaki and senior members of his Cabinet led by the then Vice President Kalonzo Musyoka launched a high-profile shuttle diplomacy to rally the African continent behind the agenda for deferral and to lobby the UN Security Council to defer the ICC processes for at least a year ‘to give space to the on-going peace and national reconciliation efforts and to pave way for peaceful elections’ in March 2013.²⁸

Kenya built its campaign on two legal pillars. The first pillar is Article 1 of the Rome Statute that defines the ICC as ‘complementary to the national criminal jurisdiction.’ Without primary jurisdiction, the court can only intervene if the

national judiciary is unwilling or unable to investigate or prosecute. The second pillar was Article 16 that permits the UN Security Council, pursuant to a Chapter VII resolution, to request the ICC to defer its actions for a renewable 12 months.²⁹ Although the African Union unanimously endorsed Kenya's deferral request, the UN Security Council rejected it offhand. The ICC became a major fault line in Kenya's electoral politics. ODM mounted a robust campaign to counter the shuttle diplomacy. Apparently, it had the implicit diplomatic backing by major Western capitals, particularly Washington and EU member states.

ODM's counter-campaign was contained in a letter dated March 11, 2011 addressed to the seating President of the UN Security Council and the African Union, which appealed to the Council that "the request for a deferral by a section of the Kenyan Government be rejected as being incompetent and frivolous".³⁰ This acrimony revealed a deeply "divided government." The UN Security Council did not take vote on Kenya's request, but the case was pushed to the cold storage and the deferral campaign technically defeated. This setback gave legs to the growing perception that the ICC was a tool in the hands of sections Kenya's political elite allied to international forces. In Parliament, the ICC was lampooned as 'a colonialist, imperialist court' that perpetrated 'selective justice'.³¹

The January 23, 2012, the Pre-Trial Chamber II confirmed charges against Kenyatta, Muthaura, Ruto and Sang, thrusting the ICC deeper into the eye of Kenya's stormy electoral politics. The ICC scheduled the trial of the four men to begin on April 10, 2013, a month after the General Election. The court's strategists surmised that with the confirmation of the charges against Kenyatta and Ruto, the duo would decide to give up their plans of contesting the election. Kenyatta and Ruto declared that they were in the presidential race to succeed retiring President Kibaki on a joint ticket.

The geopolitics of the 2013 election

The joint presidential ticket of Kenyatta and Ruto, two suspects facing trial at the ICC, sent shockwaves across world capitals and threw the West into a deep diplomatic dilemma. The dilemma that the duo posed by their decision to vie for Kenya's highest office became clear from a widely read article based on a Gallup poll and published by the authoritative world affairs magazine, *The Economist* (October 10, 2012). The article announced to the world two strikingly contradic-

tory messages from the Kenyan voter: The first is that Kenyans overwhelmingly support the ICC and the war on impunity; the second is that in the presidential election, the majority of voters intend to support either a candidate who is among those the ICC has indicted, or one who plans to save them from being put in the dock at The Hague.³² The poll ranked Kenyatta and Ruto as second and third favourites, respectively, in the race for the presidency in 2013. This meant that a joint ticket was almost a sure victory for the two.

The response was immediate. High profile international figures, including US Secretary of State Hillary Clinton, Former UN Secretary General Kofi Annan and UK Foreign Secretary William Hague jetted into Kenya with a singular message of warning to Kenyan voters that they risked paying a heavy price if they elected individuals facing charges at the ICC, as this could turn Kenya into a pariah state.

Old bridges were also burnt. Rather naively, Annan met the ODM team, including Prime Minister Raila Odinga, but snubbed the rivals in the G7 Alliance: Vice President Kalonzo Musyoka, Deputy Prime Ministers Kenyatta and Musalia Mudavadi and Justice Minister Eugene Wamalwa. President Kibaki snubbed Annan—although he was reportedly willing to meet former Tanzanian President Benjamin Mkapa who had accompanied Annan.³³

The last, and most significant, of the ‘jet-set’ to visit Kenya in October was the newly appointed ICC Prosecutor, Fatou Bensouda, who carried a concise message forewarning the Kenyan voter that there was nothing that the country could possibly do to postpone or stop the ICC train. “The judicial calendar at the court will not be altered. The ICC judges are not bound by any political processes,” she warned. “There is no immunity for the International Crimes at the ICC,” she added, stressing that Kenyatta and Ruto would not get any respite from the ICC even if they won the next elections.

By the mere act of joining the jet-set of Clinton, Hague and Annan and bearing the same message warning Kenyans not to vote for Kenyatta and Ruto, Bensouda has guilelessly buttressed the perception of the ICC as an instrument of the West’s ‘regime change’ plot in Kenya. She left Kenya and the region more politically inflamed than she had found it.

In February 2013, a month to the election, the West was back in town this time around carrying an even a bolder and louder warning message. A senior US State Department official, Johnnie Carson, issued the infamous ‘choices-have-consequences’ warning to the Kenyan voters. “We live in an intercon-

nected world and people should be thoughtful about the impact that their choices have on their nation, on the region, on the economy, on the society and on the world in which they live. Choices have consequences,” Carson cautioned. America’s warning was quickly taken up and sensationally amplified by EU and other western diplomats in Nairobi. The British envoy and other major European Union powers subtly threatened to limit contacts with Kenya to ‘essential’ matters if the two were elected. Arguably, the West’s heavy rhetoric inadvertently won the March 9, 2013 presidential election for Kenyatta and Ruto.

Integrity wars

The decision by the court judges to schedule the trial of the Kenyan cases to commence on April 11, 2013, over a month after the elections, cleared the last hurdle for Kenyatta and Ruto to run for the March presidential contest and a possible re-run scheduled for April 4. Nevertheless, the ICC cases remained a veritable pivot in vicious ‘integrity wars’ in Kenyan courts over the eligibility of the duo to run for the election.

Some civil society activists aligned to the ICC embarked on a flurry of litigations on an ‘integrity platform’ aimed at preventing Kenyatta and Ruto from participating in the presidential poll, but with no success. In January 2012, a group of civil society activists and internally displaced persons filed a petition before the High Court challenging the eligibility of Kenyatta and Ruto to run for the country’s presidency over the ICC trials. Outside the courts, the case triggered a heated public debate on whether the two were fit to contest for the presidency, forcing Justice Isaac Lenaola to stop all public debate on the case.

Kenya’s reformed judiciary under Dr Willy Mutunga as Chief Justice and President of the Supreme Court was hard-pressed to guard its reputation as Kenya’s sharpest tool in tackling impunity and integrity. In March 2012, Chief Justice Willy Mutunga appointed a three-judge bench to hear and determine the petition by civil society. The hearing was scheduled to begin on November 29, 2012, and the ruling on January 17, 2013.

But the court was bound to be extremely cautious because of the high-stake ethnic politics in the run-up to the 2013 polls. A court decision that could bar Kenyatta and Ruto from contesting the election could prove disastrous because it could be interpreted as a ploy to give the two a technical knock-out and their rivals an unfair advantage in the raging battle for state power and the soul of Kenya. This could plunge the country deeper into ethnic conflict.

On October 26, 2012, the petition seeking the High Court’s interpretation on Chapter Six of the Constitution on leadership and integrity regarding the eligibility of Kenyatta and Ruto took a new twist following a fresh application to stop the proceedings.³⁴ Two activists petitioned the High Court to stop the hearing and determination of the case pending the hearing of their appeal against the striking out of the names of other five presidential candidates. In the end, the case on the eligibility was dismissed by the court.

Kenya’s assertive foreign policy

The ICC pivot in Kenyan politics and international relations forced the new administration of Kenyatta and Ruto to adopt a new Africa-centred and assertive approach to international relations. The fierce ideological battles around the ICC trials in the run-up to the 2013 elections radicalised Kenya’s foreign policy orientation under the new Jubilee government.

After March, the West adopted a ‘wait-and-see’ policy, fearing that Kenyatta and Ruto would fail to honour their commitment to international justice and abscond from trial. This would have been met with swift issuing of arrest warrants, imposition of individual sanctions and global financial isolation to show that choices truly have consequences.

But Kenya adopted a policy of ‘strategic non-compliance’ with the ICC hoisted on four ideological planks: nationalism, regionalism, solidarity with emerging powers in the South and mutual respect and equality in global affairs. The first pillar stressed ‘Kenyan nationalism’ with a view to reasserting the country’s ‘sovereignty’ and ‘mutual respect’ which had been eroded by the ICC. The second pillar of this policy is regionalism. Long before their election, Kenyatta and Ruto had embarked on regional diplomacy to consolidate relations with their Eastern African neighbours of Uganda, Tanzania, Burundi, Ethiopia, Rwanda and South Sudan. During his inauguration, Kenyatta declared that Kenya’s destiny is inextricably joined to that of the region, and Kenya’s military band played the official anthem of the East African Community. Kenya spear-headed a partnership with Ethiopia and South Sudan to implement an ambitious Kshs 2.1 trillion flagship project known as LAPPSET that seeks to jointly build a second port in Lamu—road, fibre-optic cable, railway and pipeline linking the three countries. It formed a coalition of likeminded states with Rwanda and Uganda—the ‘coalition of the willing’—to fast-track infrastructural development,

including a Kshs 1.3 trillion Standard Gauge Railway from Mombasa to Malaba and Kisumu and ultimately to Kampala and Kigali.

The third pillar is pan-Africanism. A dozen-odd African leaders attended Kenyatta's inauguration in April 2013, and nearly two dozen attended Kenya's Jubilee celebrations in December. At the inauguration and the 50th anniversary fete, President Museveni praised Kenyans as 'the new Mau Mau' for rejecting the 'blackmail' of 'usual opinionated and arrogant actors [who] are now using the ICC to install leaders of their choice in Africa and eliminate the ones they do not like.' Again, during Mandela's national memorial service, President Kenyatta was one of three African personalities—including presidents Barack Obama and Robert Mugabe—who were wildly cheered by mourners. Kenya under Kenyatta is the new focal-point for pan-African resistance against the erosion of the sovereignty of African states in the new geopolitical struggles.

Kenya took its fight against the ICC to the continental front appealing to pan-Africanist ties to get continental backing. In October 2013, the African Union summit in Ethiopia passed a resolution that no sitting President should appear in an international court. The bloc also urged Kenya to pursue a deferral against the cases facing Uhuru and Ruto.³⁵ During the meeting, President Kenyatta successfully marshalled 53 out of 54 African states behind Kenya's push for the deferral and fresh investigations of the ICC cases. And in October, ahead of President Kenyatta's trial scheduled for November 12, the AU convened an extraordinary summit that adopted perhaps the boldest challenge to the West's global hegemony since the end of apartheid. It called on President Kenyatta and his Deputy to defy the ICC trails pending action by the United Nations Security Council on Kenya's deferral request.

The fourth and final pillar is the assertion of the global principle of equity and mutual respect among nations. On November 15, in a historic move, the African Union tabled a resolution calling on the Council to halt the trials of Kenya's President and his Deputy. Although the resolution lost the vote narrowly, this was a partial triumph for Kenya. It had managed to mobilise the continent around a common issue and to draw global attention at the highest level to its ICC cases. In the same token, during the Assembly of State Parties (to the Rome Statute that establishes the ICC) meeting at The Hague, Kenya clinched another symbolic victory. Its leadership was recognised as having 'extra-ordinary duties as heads of state (Rule 134) and were allowed to use the video-link during trial in absence.

Kenya's changing relations with the West

The election of Kenyatta and Ruto threw the West into a deeper diplomatic dilemma. America and its European allies adopted a ‘wait-and-see’ approach. Europe’s approach to Kenya seems to have followed America’s policy. Kenya was depicted as a country being shunned by its traditional partners. From June 27 to July 2, 2013, President Barack Obama made his most extensive presidential visit to Africa, covering Senegal, South Africa and Kenya’s neighbour, Tanzania. In a classic ‘choices have consequences’ fashion, the election of Kenyatta and Ruto was widely invoked as the reason why Obama ‘skipped’ visiting his ancestral land of Kenya during the visit.

In a few months, the ‘wait-and-see’ policy soon gave way to essential contacts. In May 2013, a month after his inauguration, President Kenyatta made his debut three-day visit to London under the invitation of Prime Minister David Cameron to attend a conference on Somalia. President Kenyatta was back again in London in April 2014, this time accompanying the First Lady, Margaret Kenyatta, who took part in the London Marathon.

Similarly, in the wake of the Jomo Kenyatta International Airport terminal fire in August, President Obama telephoned the Kenyan President. He called again after the terrorist attacks on the high-end Westgate shopping mall that killed nearly 70 people in September.

President Kenyatta was among the 47 African leaders that Obama invited to attend America’s first-ever US-Africa Leaders’ Summit in Washington on August 5–6, 2014. This move indicated that America had been unable to place Kenya in the same league with African nations it then considered ‘pariah’—among them Sudan, Zimbabwe, Madagascar and Guinea-Bissau and Egypt.

President Kenyatta was back to America in September when he attended the United Nations General Assembly (UNGA) in New York and was a guest during a reception President Obama hosted in honour of Heads of State and Government attending the global forum. In his speech during the fete, President Obama made a striking reference to ‘my grandmother’s village more than two hundred miles from Nairobi,’ and reportedly stated that he would visit Kenya before the end of his term. This promise came to be fulfilled when Obama visited Kenya in July 2015. Although the frosty relations with the West appears to thaw with the ICC withdrawal of charges against Kenyatta in December 2014, the ongoing case against Ruto still makes the relations between Kenya and the West lukewarm.

Looking East and South

Inversely, relations with the emerging nations in the global South (Asia and Latin America) has warmed up. Long before the stand-off between Kenya and the West over the ICC, Kenyan foreign policy wonks had crafted a “Look-East Policy” strategy in the 2005–2007 hiatus to forge closer cooperation with emerging economic powerhouses to realise its dream of becoming a middle-income nation by 2030. (Although the Kenyatta Government has set itself the goal of realising *Kenya’s Vision 2030* goals earlier by a decade).

The Kenya-West stand-off opened space for China and other emerging powers to gain a toehold in Africa. China’s new ‘soft power’ approach to international relations has bolstered a new assertive diplomacy in Kenya as elsewhere in Africa.³⁶

In mid-August 2013, President Kenyatta visited Russia and China as part of Kenya’s effort to strengthened relations with the East (including India) and the global South (Brazil, Argentina). Kenya’s ‘Look-East’ policy got a new boost when China’s Prime Minister Li Keqiang made an official visit to Nairobi on May 9–11, 2014. This confirmed Kenya as East Africa’s economic powerhouse and a pivotal state in the African strategy of the world’s ‘second superpower’—alongside America.

But Kenya’s Look-East policy is still a weak economic alternative. Kenya’s economy is still dependent on the traditional partners in the West for markets, foreign investment, development assistance and tourists. In 2011, Kenya exported goods worth Kshs 52 billion (23 per cent of its total exports) to the West compared to only Kshs 3.8 billion to China and Kshs 9.8 billion to India. But the ground is politically shifting. The withdrawal of Kenyatta’s charges at the ICC seems to signal a new political phase in Kenya’s political and economic relations with the West and the East.

Conclusion

The Kenyan cases at the ICC and the subsequent reaction to the cases are part of a larger geopolitical theatre where the West is using the court as an instrument of a new ‘judicial colonialism’. Kenya, like other African states, perceives the ICC as an instrument of Western imperialism. The decision by two candidates facing charges at the ICC—Uhuru Kenyatta and William Ruto—to vie for the presidency on a joint ticket during the 2013 polls threw the West into a serious diplomatic dilemma. The ICC morphed into the most potent divisive issue that shaped the campaigns, and largely determined the outcomes of the polls. Indeed, the election was viewed by some as a referendum on the ICC, which the forces allied to the court lost. If the Mau Mau anti-colonial war in 1952–1962 was the anvil on which 20th century Kenya was forged, the ICC factor has become the crucible for 21st century Kenyan politics and diplomacy. Inadvertently, the ICC has become a focus of Africa’s new “war on neo-imperialism.”

Notes

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From Sinners to Saints?: The ICC and Jubilee's Triumph in Kenya's 2013 Election

THOMAS P. WOLF¹

The next election will be very different from all those that came before. It will be Kenya's first single-issue election. The one wedge issue that will divide the politicians and by extension the electorate will be this: What is the candidate's position on International Criminal Court (ICC) action and will the candidate, if elected into office, cooperate with or block the handing over of the Ocampo Six to face international justice?...

...Mr Odinga has also emerged as the candidate that unsettles the Kibaki camp most ahead of 2012, not least because of the uncertainty about how cooperative the next president will be with the ICC and how much higher prosecutors might want to go in their search for suspects to face trial over the post-election violence...

—(Kimani & Owuor 2011).

Q: "How in the world could Kenyans elect crimes-against-humanity indictees?"

A: "How could they not?!"

—Personal Interview, 26 April, 2014).²

'The ICC was definitely a factor in this election, but not necessarily the factor you would expect...It got people out. People were saying, 'They're our boys, they're our sons, we need to protect them'".

—M. Kiari, quoted in *The New York Times*, 2013

In considering the outcome of the Kenya’s 2013 presidential election, the central question that this chapter addresses is how what was initially considered a fatal liability—the indictment of Uhuru Kenyatta and William Ruto by the International Criminal Court (ICC)—in retrospect was seen by many observers (as well as by their own campaign team) as an important, if not their most vital, asset.

In addressing this question, two challenges arise. One is that an election encompasses multiple if (in part) overlapping stages or processes. These include especially: the initial, individual decisions to contest; organizing allies and mobilizing resources; obtaining political party nominations (from established or new parties); identifying and promoting campaign themes (at rallies, in written materials and during public debates); maximizing voter registration and turnout in areas of greatest potential support; attracting at least some votes from other areas; extensive (if not universal) deployment of well-trained and motivated party agents to ‘protect’ the vote; and so on.

The other challenge is that exploring each of these in terms of its contribution to an election outcome requires a demanding mix of quantitative and qualitative tools that must be appropriately utilized.³ As such, even quite rigorous research methods, especially when applied without regard to “the local language of political debate” (Lonsdale 1992:301), may yield results that are grossly misleading. To take an example from the 2013 contest: an election-day exit poll found that only 3.3 per cent of the 6,258 respondents mentioned the ICC issue as the “main reason” for their ballot-choice (whether for or against any candidates), leading to the erroneous conclusion that “voters seemed to care more about bread-and-butter issues—employment and the economy, security, and corruption—than the indictments” (Long *et al.* 2013:147).

More generally, as is widely recognized, in Kenyan (especially presidential) elections the two most important factors in determining voter behaviour are ethnic identity-loyalty and material resources, the latter directed at communities and other groups as well as at influential individuals (or even at ‘ordinary’ voters, including to pay them to vote or to buy their voters’ cards to prevent them from doing so). But systematically analyzing how each of these factors operates, at times simultaneously, is a major challenge, beginning with the precise specification of the categories or concepts involved.

Regarding the first factor, for example, beyond their varying sizes, no two Kenyan ethnic groups have the same degree of internal homogeneity in either pre-colonial and contemporary terms, while many voters must choose from a

list of contenders (together with, from 2013, their deputy president running-mates) that lacks anyone of their 'own'. And some voters who have this option often reject it, having taken into account both individual public history, personal qualities and electoral-credibility (in terms of having a realistic chance of doing even minimally well, based on voter-intention surveys and other methods of measuring vote-winning potential).

To cite two examples from this 2013 election: presidential candidate Musalia Mudavadi's (if internally quite diverse) Luhya community constitutes some 15 per cent of Kenya's population, but he obtained just 4 per cent of the vote (based on a turnout rate that was significantly below the national average);⁴ and James ole Kiyiapi, received less than 0.5 per cent of the vote, yet nearly 2 per cent of all Kenyans belong to his Maasai community. In addition, the ethnic factor may operate in a negative sense, in that especially members of ethnic groups lacking a viable (or any) candidate of their own, in many cases will vote for the candidate who appears the least threatening to their perceived interests (often based on the guidance of their own, local, 'trusted' leaders), rather than the one they believe will serve them 'best'. Moreover, all such analytical-undertakings require a completely uncontentious official result in terms of any fraudulent practices, or even unintended administrative errors, in attempting to measure the impact of such factors.⁵

For the analysis which follows, however, while the 2013 Kenyan presidential result did attract two petitions filed at the Supreme Court, both of which reportedly contained voluminous evidence of alleged malpractice that was deemed inadmissible on technical grounds,⁶ the fact that Jubilee achieved a (narrow) first round victory is largely irrelevant (as are the ultimate outcomes of the ICC cases). What is relevant is the following set of facts: first, that Kenyatta and Ruto saw clearly that their Hague-based fates would depend largely upon who held power after Mwai Kibaki completed his second and final presidential term; second, that they similarly recognized that it was to their advantage to contest as a team; third, that they succeeded in enlisting to that cause the backing of the most influential figures in their respective ethno-political constituencies; fourth, that the closer the country moved to the election, the more determined were the most powerful elements in the Kibaki-led government to frustrate the ICC's work in pursuing these cases (Nichols 2015; Mueller 2014⁷); fifth, that neither the recently established Independent Election and Boundaries Commission (IEBC) nor the reformed Judiciary exercised the option to bar them from

standing on integrity-constitutional grounds;⁸ and finally, that they obtained the vast majority of votes from their fellow-ethnics, while extending their appeal to certain other ‘neutral’ areas, as well as winning considerably more votes in their CORD opponents’ ‘strongholds’ than the latter did in theirs.⁹

Further, what was critical about their achieving a first round victory was that, according to most assessments, their success in a second round run-off contest was highly doubtful owing to two main factors: that its constitutionally-mandated date (April 10) coincided with the scheduled start of their ICC trials and thus would likely ‘rattle’ their supporters, and that Odinga would harvest most of Mudavadi’s votes.¹⁰ Whatever the case, the basis of the analysis presented here is that their electoral partnership was largely a product of their shared criminal-indicted status, while tapping into the widespread aversion among Kenyans to a repeat of the violence that had nearly pushed the country over the ‘precipice’ following the previous election (Kenya National Commission of Human Rights, 2008)—and mounted a highly effective campaign. In other words, while the ICC represented a ‘sword of Damocles’ in terms of its legal threat to the “alliance of the accused,”¹¹ it ironically came to constitute a necessary (if not entirely sufficient) condition for electoral success.¹²

Looking back at the election, the African Union mediation team that brokered the February, 2008 power-sharing deal that ended the immediate post-election crisis could thus conclude:

Some two weeks before polling day, the High Court ruled on a suit that challenged the eligibility of Uhuru Kenyatta and William Ruto to stand for election on integrity grounds. The court declared the case did not fall within its jurisdiction and should be judged by the Supreme Court. From that moment, Kenyatta and Ruto framed the elections as a referendum on the ICC and intimated that, if Kenyans elected them to office, they would be voting against the ICC—a view their supporters had advanced since charges had been confirmed against them in January 2012. The two were subsequently elected... (African Union 2014:119).

How, then, was this possible?

The ‘Tyranny of Numbers’ vs. The Survey Evidence

The principal dynamic, if nothing changes dramatically before the next elections, will be the effort to stop the pro-ICC Prime Minister from ascending to the presidency...

The PM will be able to call upon the support of civil society and the media, which have been fairly consistent in this support for ICC action.

Mr Odinga will also seek to win the support of the two thirds of Kenyans that opinion polls say back trials at The Hague, as he seeks to build a cross-ethnic alliance that might help him ascent [sic] to the presidency (Kimani & Owuor 2011).

The mobilisation by Ruto and Kenyatta has not been without effect on public opinion. In presidential opinion polls conducted in August 2010—three months before the ICC prosecutor named Kenyatta and Ruto as suspects—Kenyatta and Ruto polled 12 per cent and 10 per cent respectively, while Odinga received 46 per cent. Since then, the prime minister's popularity has gradually been sliding. By portraying him as the villain, Kenyatta, especially, has succeeded in eroding Odinga's support base. Polls conducted in April 2012 showed Kenyatta polling 22 per cent and Ruto 8 per cent, while Odinga had slid to 34 per cent (Kegoro 2012:20–21).

As noted above, ethnic identity has played a central, if quite varying, role in all presidential elections in Kenya. This was no less true in 2013, where due in large part to the ICC issue, the country became increasingly polarized on this basis (see below). It is thus impossible to distinguish between these two (issue vs. identity) factors. Recall here the words of the current Deputy President moments after he was sworn into office on 9 April, 2013:

In 2002, many people did not believe it was possible for people from Nyanza [i.e., the Luo] to vote for Kibaki, they voted almost to a man for him. In 2007, many people did not believe Rift Valley [i.e., the Kalenjin] would vote for Raila Odinga, [yet] they did it almost to a man. In 2013, many people did not believe that Kalenjins would vote for Uhuru, [yet] they indeed voted [for him] almost to a man (NTV, 2013).

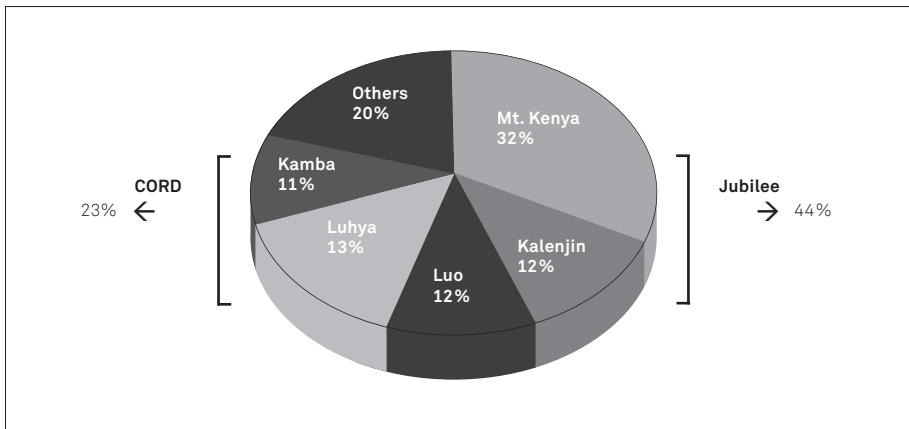
Or, as one Baringo resident in the Rift Valley put it (with specific, if metaphorical, reference to the ICC issue) a few weeks before she voted in 2013:

When the [ICC] *tsunami* is coming, it's safer [for us Kalenjin] to 'climb up the mountain' [Mt. Kenya, in Kikuyu-land] than to 'go down to the lake' [Lake Victoria, in Luo-land]; (Personal Interview, Nairobi, 17 March, 2013).¹³

Yet, such ethnic ballot-concentration—at least among groups with credible candidates for the president and their deputies—may well have occurred even without the ICC issue (as was the case—however dissimilar the contours—in 2007); it is simply impossible to know. But to the extent that it could be counted on, it played strongly to Jubilee's advantage. This was a consequence, in the words of local political scientist Mutahi Ngunyi, of a 'tyranny of numbers': that

the two main ethnic groupings represented by Kenyatta and Ruto (the Mt. Kenya peoples and the Kalenjin¹⁴) constitute nearly twice of the size of the combined communities (the Luo and the Kamba) of their CORD rivals, Raila Odinga and Kalonzo Musyoka, 43 per cent vs. 22 per cent, an advantage that was modestly though crucially magnified through the combination of voter registration and turnout (*The Star*, 2013a).¹⁵ Thus, if the election outcome was to be determined primarily by ‘blind’ ethnic loyalty,¹⁶ such a census-based ‘head-start’ meant that Jubilee needed relatively additional few votes from the remaining one-third of the electorate in order to achieve its first round 50 per cent+1 victory, as indicated by Fig. 1:¹⁷

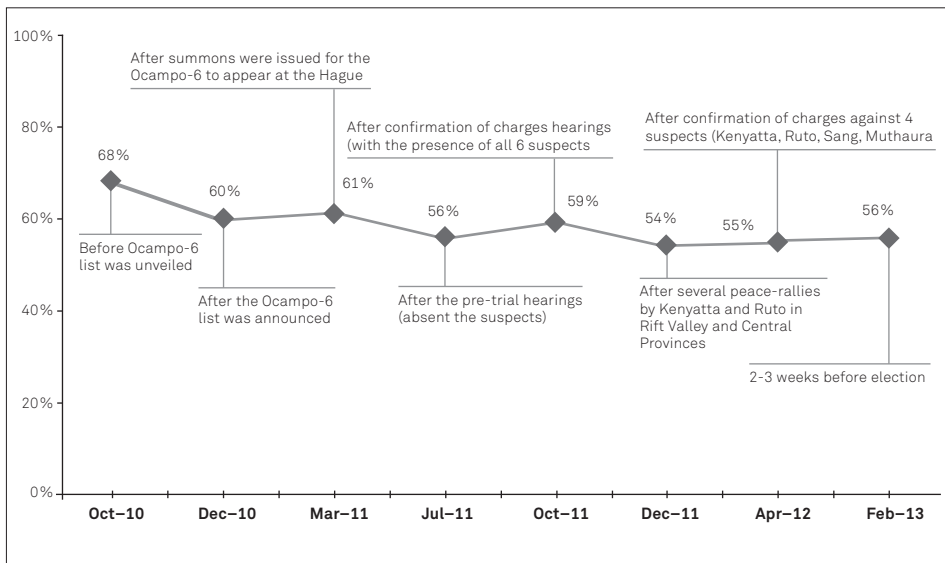
Figure 1: Estimated combined voter registration: CORD vs. Jubilee¹⁸



But other data suggest quite the opposite: that support for accountability for the post-election violence (PEV) as subsequently embodied in the ICC’s indictments¹⁹—after three aborted attempts by parliament to establish a special local tribunal (Brown & Sriram 2012), together with the exclusion of prosecutorial powers from the remit of the Truth, Justice and Reconciliation Commission (TJRC)²⁰—was high enough to thwart any realistic electoral effort by the indicted candidates. These are derived from national surveys obtained over a three year period prior to the election (Fig. 2, shown together with key events in the ICC-Kenya ‘calendar’).²¹

Following a modest initial drop (of 8 per cent) at the end of 2010, apparently reflecting the reality-shock of the country's formal commitment to the Rome Treaty for the first time when the so-called 'Ocampo-Six' were named,²² there was hardly any change in the proportion of those supporting the Court's involvement (considering the error-margins associated with the surveys' sample sizes) right up to the eve of the election itself: a modest, if clear, majority:²³

Figure 2: Support for ICC trials (Showing key events); October 2010–February 2013²⁴



On the basis of such figures, the possibility that those who stood accused of being the “most responsible” for the serious crimes committed could win an election seemed remote at best. Yet, such an assumption is less convincing than would first appear.

Specifically, correlation analysis of the survey data reveal that a significant minority of those respondents favouring the ICC's involvement were nevertheless supporters of one or the other of the eventual Jubilee candidates, and ultimately were prepared to vote for them. Such individuals may have been confident that based on their assumed innocence, they would ultimately be vindicated at The Hague,²⁵ and/or that going through the trials would strengthen them politically in the long run, however disruptive doing so was in the near

term. In addition, some respondents who grasped Kenya’s obligation to co-operate with the Court may have considered a refusal to do so unacceptably damaging, thus giving it ‘rhetorical’ support in such interviews.

Most relevant for the competition for votes as the election approached, this general support for accountability had become increasingly polarized. In particular, for the first two years after the signing of the National Accord that ‘resolved’ the immediate 2008 post-election crisis (and however acrimonious were the disagreements regarding its implementation), there was equal, if not greater, public support for accountability on the PNU side of the political divide. For example, in June, 2008, more than twice as many residents of Central Province as those of Nyanza supported the suggestion that “everyone involved in it should be held accountable” (89 per cent vs. 40 per cent)—with five times more ODM than PNU supporters favouring amnesty for the perpetrators (60 per cent vs. 12 per cent). Just a year later, however (in July, 2009), this difference had evaporated, as 68 per cent of both self-identified PNU and ODM supporters favoured the intervention of the ICC (over a special tribunal or the regular judiciary) to pursue the “main perpetrators” of the PEV, with only 3 per cent more of the latter opting for the “forgiveness-with-amnesty” option (16 per cent vs. 13 per cent).²⁶

However significant these contrasts, this general demand for accountability reflected particular current factors on each side. Regarding ODM, because its leadership never took responsibility for the PEV, no policy-clash was involved for (most of) its supporters on this issue. Moreover, wedded to the belief that most of the violence from ‘their’ side was spontaneous—a protest against perceived election-theft—it was cognitively difficult for them to accept that it could be the subject of criminal proceedings, in contrast to the deaths (some 40 per cent of total fatalities) caused by Police firing at (usually unarmed) protestors (Republic of Kenya 2008b:342). On the PNU side, such accountability ‘made sense’, since most directly-targeted victims of the (Kalenjin) ODM youth-militias were their fellow-PNU followers (especially Kikuyu and Kisii in the Rift Valley; the brief if ferocious retaliation attacks (by Kikuyu/Mungiki youth on mainly Luo and Luhya) in Naivasha (that occurred in late January just before the Serena talks began) were probably much further from most of their minds.

By July, 2011, however, a significant gap had emerged between ODM and PNU supporters over the ICC’s involvement, with 72 per cent of the former continuing to favour it, as opposed to only 40 per cent of the latter. Such a develop-

ment followed not just the naming of the ‘Ocampo-Six’ the previous December, but also a concerted politicization of the issue, supported from the ‘top’.

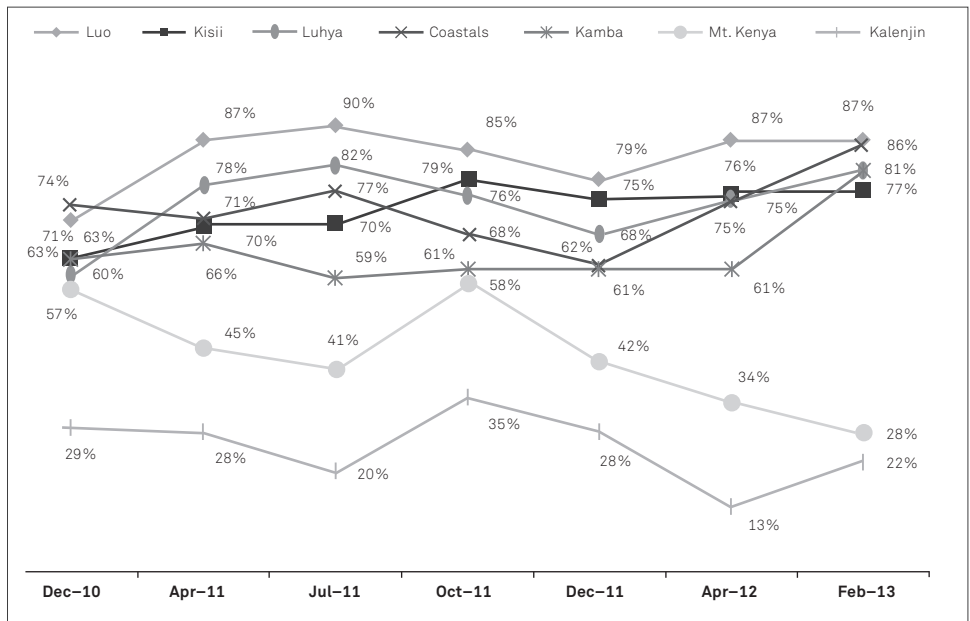
For example, in January, 2011, Kenyatta and Ruto (then each presenting himself to the public as a future presidential candidate) convened a huge rally in Eldoret, the epicentre of the PEV. Ostensibly to build peace between their respective communities, in fact this was the launch of a major onslaught against the ICC. Perhaps most significant in this regard was the presence of President Kibaki, as this symbolized not just his government’s determination to thwart the future course of the investigations, but also his support of this team’s maturing electoral ambitions (Kegoro 2012:19).²⁷

This ‘flip-flop’ in attitudes towards accountability for the PEV was also mirrored in positions held by the main political groupings in Kenya towards a domestic truth-and-justice initiative over this same period. As the authors of a comparative study of such commissions in Africa have pointed out:

...In 2008, therefore, and in the context of the amnesty debate, the TJRC initially came to be associated with ODM and perceived as a bulwark against possible prosecutions. The PNU, on the other hand, initially advocated for legal accountability, particularly for the deaths that occurred in the Rift Valley. Transitional justice options were therefore viewed from [sic] an inherently political prism in terms of their ability to advance or inhibit the exclusive interests of each party.

Positions would change dramatically by 2010 following, first, the falling out of individuals within ODM and, second, the publication by the ICC of the names of the 6 persons thought to bear the greatest responsibility for the post-election violence. At one point, the coalition Cabinet expressed the view that a TJRC with an expanded mandate could serve as an alternative to the ICC prosecutions (Wachira *et al.* 2014:122).

That such polarization over the ICC’s pursuit of these cases took an increasingly communal dimension is evident when the national numbers (as shown above in Fig. 2) are disaggregated by Kenya’s main ethnic groups (as shown in Fig. 3):

Figure 3: Main ethnic groups' support for the ICC's involvement: 2010–2013²⁸

Especially striking is that members of all these larger communities differed only modestly before the identification of the ‘Ocampo-Six’—aside from the Kalenjin, whose level of support for the ICC process was 28 per cent lower than the next least-supportive group, the ‘Mt. Kenya’ cluster at 57 per cent. As suggested above, the gaps between them and all other communities widened immediately thereafter (from April, 2011), though they narrowed somewhat by late-October, 2011 just after the confirmation-of-charges hearings (when in national terms support for the ICC increased marginally, by 3 per cent, as shown in Fig. 2, above).²⁹

By the end of 2011, with Kenyatta and Ruto even more aggressively attacking the ICC at their ‘peace’ rallies, the gap widened again, and continued to do so as the election approached. At the same time, the gap between the Mt. Kenya and Kalenjin averaged a substantial 21 per cent throughout the period shown, up to the final poll, following the formal political ‘embrace’ of these two leaders in the Jubilee Coalition, when it fell by more than two-thirds, to just 6 per cent (entirely as a consequence of increased support for the ICC option by the Kalenjin, of 9 per cent).³⁰

Of note, however, at no time did Kalenjin support for the ICC process approach zero, with more than one-in-five supporting it from the outset, aside from the April, 2012 survey results, though it regained most this ‘lost ground’ in the final pre-election poll.³¹ (Also notable is the 20 per cent up-swing in support for the ICC among the Kamba after vice-president Kalonzo Musyoka became Odinga’s deputy president running-mate, suggesting the salience of perceived political advantage/ethnic loyalty as opposed to a purely moral or ‘justice’ motivation among at least a section of his community—indeed, if not among all Kenyans).³²

Several other findings from Ipsos-Synovate’s final pre-election survey suggest the extent to which this issue divided the electorate a few weeks before votes were cast on March 4. For example, only 12 per cent of those reporting their intention to vote for CORD favoured “amnesty-and-forgiveness” rather than prosecution of the four remaining ICC defendants, whereas 68 per cent of those intending to vote for Jubilee now took this position (Ipsos-Synovate 2013). Such increasing correspondence between electoral and accountability preferences is seen even more clearly in that only 23 per cent of pro-Jubilee voters thought Kenyatta and Ruto would attend their Hague trials if they won, while twice as many (47 per cent) thought they were “likely” or “certain” to do so if they lost. (The comparable figures for pro-CORD voters were 13 per cent and 56 per cent.³³) At the same time, while more than two-thirds of CORD voters expected that Kenya’s economy would suffer “a great deal” if Jubilee won the election due to the “consequences” imposed by Kenya’s traditional ‘development partners’, hardly one-fifth (19 per cent) of Jubilee supporters had this concern. And on a closely related matter, whereas two-thirds (66 per cent) of the former approved of diplomats telling Kenyans that relations with their countries would suffer if the ICC-indictees won the election, an identical proportion of Jubilee voters opposed such warnings.

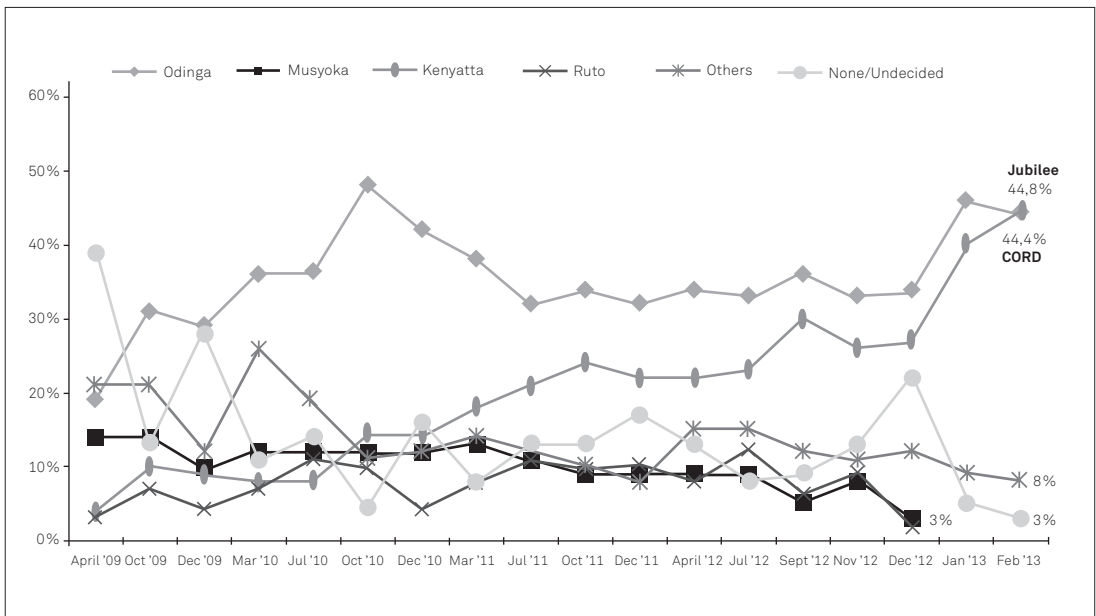
Altogether, then, while it remains impossible to estimate the precise contribution of the ICC issue to Jubilee’s electoral success, it is evident that the electorate was highly polarized over this issue, and that its salience greatly exceeded that which the exit poll (reported above) sought to measure.³⁴ This is especially true when the focus is broadened beyond the election’s presidential ballot-choices so as to include the entire period leading up to this specific event.

Yet at the outset of this unfolding drama, various influential (and supposedly astute) observers made profound miscalculations regarding the impact of the ICC-accountability process. For example, late in 2008, US Ambassador Michael Ranneberger (confidentially) suggested to his State Department colleagues in Washington that Martha Karua’s declared presidential bid would benefit should the charges against Kenyatta be confirmed, as would those of Odinga and Mudavadi should Ruto be similarly indicted (kenyastockholm.com, 2010).³⁵ And over two years later (a few months after the ‘Ocampo-Six’ were named), a leading Kenyan political columnist asserted that such formal indictments against Kenyatta and Ruto “would almost certainly end these ambitions”, with Odinga being “the foremost beneficiary” (Warigi 2011).³⁶

In retrospect, therefore, this appraisal of the Court’s impact on the unfolding political environment by a Nairobi-based expatriate international law scholar made shortly before the charges were confirmed in January, 2012 was a major misreading:

[S]hould the Court decide to charge Ruto and Kenyatta, both will face an uphill battle in gaining the presidency. First, many commentators argue the new Constitution should be understood to prohibit anyone charged with a serious crime from running for president... Second, should Ruto and Kenyatta nonetheless run for president, Odinga and the other presidential candidates are likely to benefit, both because charges of crimes against humanity can hardly be seen as an asset in an election campaign and because the two suspects will be busy preparing their defences for trials in The Hague (Hansen 2011:22).³⁷

Such convictions tapped into the assumption that the ICC factor would likely constitute an insurmountable hurdle in terms of three main factors: the conflict-grievance gap between the Kikuyu and Kalenjin (and especially among opinion leaders within their own communities);³⁸ logistic encumbrances in preparing for and later attending the trials (initially expected to begin well before the election); and the integrity prohibitions in the new constitution (as noted above).³⁹ Yet, ironically, the fact that all were overcome gave their eventual joint-campaign even more energy-impetus than it would otherwise have enjoyed.⁴⁰ The record of Ipsos-Synovate’s presidential voter-intention polls over nearly a four-year period leading up to the March 2013 election (as shown in Fig. 4) summarizes this success:

Figure 4: Support for potential/actual (main) presidential candidates: 2009–2013⁴¹

Moreover, Kenyatta's (and from December, Jubilee's) steady climb in the presidential candidate popularity figures is closely correlated with an increasing polarization over the ICC in ethnic terms (as shown in Fig. 3, above).

But the key question remains: how was this shift, and the political opportunity it provided to the ICC defendants, possible?

Sinners-to-Saints 1: The Truncated Accountability Agenda

Initially, America, which sees Kenya as a front-line ally in a war against Islamist militias in neighbouring Somalia, made the mistake of endorsing the President's re-election. Now Britain, America and the African Union are urging Mr. Odinga and Mr. Kibaki to talk in an effort to stop the bloodletting. That lets Mr. Kibaki off the hook far too easily. All the violence should certainly be condemned, but most of the diplomatic pressure should be exerted on Mr. Kibaki's supposed new government to annul the results and organise a recount—or a new vote (*The Economist*, 2008).⁴²

...Amnesty is a delicate tool and should be used sparingly, if at all. Our experience of observing human rights around the globe shows that the best way to safeguard those rights is to

make sure that those who violate them are brought to justice. Above all, crimes against humanity, war crimes, genocide, torture, and sexual violence should not be amnestied. Justice is for both the victims and the accused (Rawlence/Human Rights Watch 2008).

Former chairman of the Electoral Commission is not on the [‘Ocampo-Six’] list. He did not commit or abet crimes against humanity. A conspiracy to rig [a] presidential election is not a crime against humanity (Kendo 2010).

At the outset of this analysis, it was suggested that the 2013 election results demonstrated that the two leaders indicted by the ICC were ultimately able to recast themselves as ‘saints’ rather than the ‘sinners’, especially within their ‘home’ communities, that their ICC indictments were clearly intended to achieve.⁴³ That such success was not pre-ordained is reflected in part by the survey figures (reported above) obtained during the period immediately following the establishment of the Grand Coalition Government. They showed strong support among followers of both PNU and ODM for holding to account those “most responsible” for the PEV, even if such support was considerably higher among the Kikuyu than among the Kalenjin.

The subsequent opinion-shift stemmed from two main factors. The first is the widespread desire for peace in the aftermath of the PEV. This desire operated both within the localities that had been most severely affected (such as parts of the Rift Valley, as noted above), and nationally, where developments were greatly influenced by various regional and international actors. This peace-priority is evident in the ‘anatomy’ of the post-election political settlement (beyond the power-sharing arrangement itself): in particular, the separation of issues related to the disputed election on the one hand, and to the violence that followed it on the other.

Such a peace/stability imperative allowed—indeed, required—that two crucial questions were never directly addressed: first, who really won the election,⁴⁴ or if that could not be determined, who was responsible for that very impossibility?; second, to what extent was Odinga’s/ODM’s access to a share of power a ‘reward’ for the PEV?⁴⁵

In the event, the National Accord assigned each of these questions to a different commission: the Kriegler Commission or Independent Review Commission (IREC), and the Waki Commission or Commission to Investigate the Post-Election Violence (CIPEV). The former, however, was itself the result of a compromise-alternative to either an immediate re-run of the election (since a

recount of votes was deemed unfeasible), or assigning to the Grand Coalition Government only short-term, transitional status, to be replaced, following an internationally-supervised election, by a new government after some months (which at first ODM considered a major concession considering their insistence that the election had been ‘stolen’ and that Odinga should therefore simply be declared president; Miguna 2012:215–221).⁴⁶ Thus, its report recommended only electoral reforms, leading eventually to the disbanding of the Electoral Commission of Kenya (whose commissioners were sent off into retirement with full pension benefits). However independent IREC was in formal terms, such limited remedies reflected the fact that the same key international actors upon whom Odinga had relied to extract even minimal concessions from Kibaki were unprepared to risk undermining the just-established peaceful status quo by opening the ‘Pandora’s Box’ as to who ‘really won’ the election.⁴⁷

By contrast, the Waki Commission not only documented the causes and course of the violence in detail, but also recommended prosecution of those deemed “most responsible”, either by a special local tribunal, or (failing its establishment through an act of parliament) by the International Criminal Court, of which Kenya had recently become a member-state.⁴⁸ Such determination reflected not only most Kenyans’ abhorrence of the PEV, but also a conviction—again, especially among key external actors, starting with Kofi Annan and the African Union’s mediation team of Eminent Persons, as well as Kenya’s key (Western) ‘development partners’—that making at least a ‘dent’ in Kenya’s entrenched culture of impunity (Nichols 2015:47–67; United Nations Human Rights Council, 2009; Mueller 2008; Wolf 2006) through the pursuit of such an uncompromising accountability agenda was essential to prevent a similar crisis in the future.⁴⁹

Perhaps most vocal among them was the U.S. Ambassador, who used a public occasion to forcefully articulate this rationale towards the end of 2009, following the unsuccessful efforts to establish a local tribunal option as an alternative to the ICC’s looming involvement:⁵⁰

...The window is fast closing for the meaningful reforms Kenya must undertake in order to avoid a repeat of the 2008 violence—or worse—and to ensure a stable and prosperous democratic future...Can leaders seize the opportunity to end the culture of impunity and launch a process of fundamental change through implementation of the comprehensive reform agenda?...The Waki and Kriegler Commissions delivered credible, detailed reports laying out

a roadmap for key reforms...While acknowledging some progress, the most important reforms...needed to end the culture of impunity and to ensure future democratic stability and prosperity have either not been implemented or are moving at an alarmingly slow pace...No steps have been taken to hold accountable the principal perpetrators of post-election violence...We continue to urge that a credible independent Special Tribunal be established in Kenya and that Kenya fully cooperate with the International Criminal Court to investigate and prosecute those suspected of orchestrating and supporting post-election violence (Ranneberger 2009).

In terms of the 2013 presidential election contest, however, the political impact of such accountability efforts would be exactly the opposite of what was intended.⁵¹

As suggested above, this failure was also partly a consequence of the widespread support given to local (i.e., Rift Valley) ‘peace-building’ efforts, that allowed the main suspects to construct a narrative in which their active participation was critical. Led initially by religious leaders,⁵² an entire civil society ‘industry’ arose—ironically, with generous (Western) donor funding⁵³—to foster reconciliation among the affected communities. As one local analyst put it: “[T]hose seen as perpetrators of the post-election violence have now appropriated the language of reconciliation; in fact, they seem to shape the discourse around this question” (Gona 2013:213).⁵⁴ Moreover, the almost total failure of the Grand Coalition Government to undertake any serious investigation/prosecution of ‘lower level’ PEV cases, only heightened the perceived value of such personalized involvement in these efforts.⁵⁵

After the election, the ICC’s former Chief Prosecutor offered his own interpretation of how what was supposed to have been an insurmountable moral-legal obstacle had been transformed by the suspects into a moral-electoral asset:

“...[B]asically what I see in Kenya is Kenyatta and Ruto were allegedly killing each other [sic], their groups, and then they were smart. They made an alliance and they presented themselves as the reconciliation process.

And Odinga, who was the other candidate said no word about post-election violence or about ICC.

So the only candidate [sic] who addressed really important issues before Kenyans were Kenyatta and Ruto.

And that's why people voted for them, in addition to the tribal affiliations. So I think it's a good example of how you can help although you cannot transform Kenya into Sweden" (L. Moreno-Ocampo quoted in *Daily Nation*, 2014a).

Such use of the ICC issue carried over into the parliamentary contests as well. In several constituencies where incumbent ODM (i.e., pro-Odinga) MPs were especially popular, Ruto reportedly used local-vernacular radio stations to plead with Kalenjin voters to elect his fellow-URP candidates on the grounds that "I need to have a big team in parliament in order to convince the other side (i.e., Kenyatta's) to give me their full support against the ICC once we are in power" (Personal Interview, Nairobi, 12 December, 2014).

Altogether, it seems difficult to overstate the magnitude of this issue at the ballot box, starting in the region which had been the epicenter of the PEV. As Lynch has argued:

...[I]t was this overlapping of individual perceptions of justice, injustice, opportunities and threats with a reality of ethnic communities as historical and moral communities that can best explain voting patterns across the Rift Valley (Lynch 2014:109–110).

Sinners-to-Saints 2: 'A Criminal Investigation, Not a Political Analysis'

...The ICC should have gone for Raila and Kibaki because that's where the violence started. They were the numbers 1 and 2, so why go just for numbers 3 and 4, or for numbers 5 and 6? (Personal Interview, Limuru, 4 March, 2013).⁵⁶

The second main factor that allowed for this status transformation was the (again, ironic) consequence of yet another effort to nurture stability: the political 'balance' in the identities of the 'Ocampo-Six'. Grievances over this issue, however, first arose with regard to the Kalenjin youth who remained in custody (amid claims of Police torture) in the immediate aftermath of the signing of the National Accord. While Odinga insisted that peaceful reconciliation was impossible without amnesty, Ruto went further in calling attention to those he claimed bore most responsibility for the crisis itself (ironically including—at least based on the purported evidence leading to the ICC indictments—himself):

"You're victimising 'small fry' whose only mistake was to demonstrate against election irregularity...

Where are the politicians who stubbornly blocked the reconstitution of the ECK [i.e., Electoral Commission of Kenya] last year? Where is the leadership of the security forces that

failed to do its work? What about the ECK commissioners who participated in the election fraud?...

If we are not ready to charge the politicians and the so called planners and financiers, then what moral authority do we have to charge mere pawns in a huge political game?...

The test the country is facing is not whether the youth should be granted amnesty. The test is whether we are prepared to continue promoting the culture of having two sets of law for [sic] the big boys and the defenceless small fry” (W. Ruto quoted in *The Standard*, 2008).⁵⁷

Yet for those whose main (if not exclusive) focus was the PEV rather than its complex causes and the full implications of such a relentless accountability agenda, the issue was straightforward, especially since the ‘Ocampo-Six’ were limited to those deemed “most responsible.” From the outset, for example, this was the position of Human Rights Watch:

...Both ODM and PNU negotiators already pledged to Kofi Annan to ‘identify, investigate and prosecute perpetrators’ of post-election violence. So what is there to argue about? If Mr. Odinga and ODM believe the police and the justice system to be partisan, as part of the coalition government and with their new-found executive powers, it is their duty to make the system work fairly. And if Mr. Kibaki and PNU are really committed to the rule of law and rejecting amnesty then they should ensure that the leaders and inciters of violence (including those among the police and their own ranks), and not just the foot-soldiers, face justice too (Rawlence/Human Rights Watch 2008).⁵⁸

With specific regard to the eventual ICC cases, there were two related aspects to such balance. First, the two ‘principals’ (Kibaki and Odinga), on whose behalf both the election fraud and (much of) the PEV, respectively, were perpetrated, were omitted. Second, the attempted PNU/ODM ‘balance’ as contained in the ‘Ocampo-Six’ list revealed in December, 2010 had already been overtaken by events, since Ruto, the key ODM figure among them, had (informally) ‘migrated’ to the PNU side of the country’s partisan divide. In addition to their quite divergent political ‘origins’,⁵⁹ this was largely due to his falling-out with Odinga over a number of personal and policy issues, among them: ‘accountability’ for the PEV, including especially the latter’s perceived abandonment of the Kalenjin youth who had ‘fought’ for him soon after he was sworn-in as prime minister (Miguna 2012:300; *The Nairobi Chronicle*, 2008); Odinga’s ‘leading role’ in overseeing the eviction of (mainly Kalenjin) ‘invaders’ of the Mau Forest water-tower; and his choice of Mudavadi rather than Ruto for the position of deputy

prime minister on the ODM side of the Grand Coalition Government.⁶⁰ And as a commentator pointed out shortly after the Waki Commission report was released, the prospect of accountability for the PEV as embodied in its findings only made matters worse:

When KANU lost power in 2002, Ruto and other orphans of the Moi regime found themselves in the cold and isolated from the corridors of power. President Kibaki's State House was closed to them and they lost the political and economic advantages they were used to. Rallying support for Raila in 2007 was only a convenient way of hitting back at Kibaki and his GEMA [i.e., Kikuyu, Embu, and Meru, or 'Mt. Kenya'] people. But now Ruto and his friends find themselves in unfamiliar territory where leaders are being called to account for their overt and covert actions. With the threat that the Waki report might take an international dimension, they find themselves in an awkward position and they naturally expect the Prime Minister to come to their rescue (Munyiri 2008).⁶¹

Subsequent events, including Odinga's attempted removal of Ruto from the Cabinet, only magnified the animosity between them.⁶² Well before the 2013 election, therefore, the remaining ICC cases were seen as part and parcel of Odinga's/CORD's 'foreign-driven' campaign strategy, allowing Jubilee to market the Western 'conspiracy'-slogan of 'the three Os' (i.e., 'Ocampo, Obama, Odinga') which appears to have been highly effective (Lynch 2014:106).⁶³ Warnings (if not threats) by Annan as well as several Western diplomats (most notably, U.S. Assistant Secretary of State for Africa, Ambassador Johnnie Carson) of dire 'consequences' for Kenya should Jubilee triumph at the polls only added fuel to this 'fire' (Wolf 2013:167–169). As a senior Jubilee operative confirmed in the wake of their successful campaign:

"It was a Godsend! I mean, here were foreign powers dictating to Kenyans on how to vote. We were shocked that a junior officer [sic] in the US government could contradict his boss. It also made Raila look like a project of Western powers and we loved it. Jubilee went into over-drive" (*Sunday Standard*, 2013).⁶⁴

In this connection, it was ironic that this anti-'Western' campaign had been devised by a prominent British public relations firm (BTP) hired by Jubilee, largely succeeding in turning the accused "from suspected perpetrators into victims" (*The Star*, 2014).

Consequently then, and notwithstanding Moreno-Ocampo's insistence at a Nairobi press briefing in May, 2010, that he was engaged "in a criminal investigation, not a political analysis" (Reuters, 2010)—a variation of which became an

equally-repeated refrain of his successor, Fatou Bensouda, that her ‘accountability-targets’ were “individuals rather than communities” (*The Standard*, 2012b)—the attempt to avoid ‘rocking the boat’ of the painstakingly-crafted Grand Coalition Government by ignoring the ‘principals’, and to appear even-handed in the selection of the initial six suspects, invited the very ICC backlash it was designed to avoid. As was noted in an analysis of these unfolding events:

From the start, the selection of six individuals, three from each side of the conflict, suggested that the ICC was not blind to the need for careful political balancing. This [balancing] opened the ICC to the perception that it was not merely following the evidence. The approach appeared to ensure the President Mwai Kibaki and Prime Minister Raila Odinga...now sharing power in the Grand Coalition Government, must also equally share the bitter fruits of the post-election crisis...However, the ICC stopped short of indicting the two top leaders themselves as the bearers of the ultimate responsibility, instead going for key lieutenants in their respective camps. The appearance of political calculation and balancing created room for propaganda about possible manipulation...[that] Kenyatta and Ruto turned...to their advantage during the campaigns...(Wachira *et al.* 2014:248).

Thus altogether, the priority placed on stability with regard to both the resolution of the Kibaki-Odinga stand-off and the pursuit of accountability engendered the very ‘imbalances’ that were later so deftly exploited by those intended to be subjected to its agenda.

Conclusion: Blind ethnic loyalty, or thoughtful issue-choice?

...Three sure things happen at the polls every five years—people are killed, Kenyans vote along tribal lines, and the same crooks are returned to power...

Why do Kenyans allow themselves to be manipulated by elites with whom they’ve nothing in common? Why is the average voter so gullible and easily tricked and bamboozled with the predictable tribal card? (Mutua 2012)

“We have to face up to the fact that people who are indicted by the ICC received a higher number of votes and that was a moral choice on the part of Kenyans” (J. Githongo quoted in McConnell, 2013).

Various critics of Kenyan political life have, especially since the return to party politics following the abruptly-enacted constitutional amendment for the purpose in December, 1991, have lamented both the general absence of substantive issues in mobilizing voter support—thereby inviting ‘blind’ ethnic loyalty

to fill this policy-vacuum—and the outright purchase of votes (via purse or patronage), whether at the collective-communal or individual level. By contrast, and however resilient such factors, the ICC Kenyan cases made the 2013 Kenyan election the most issued-based since that of 1963, when the ‘*majimbo*’ (i.e., federalism) debate dominated campaign discourse and voter motivation (Anderson 2006).⁶⁵

Having said this, just how the ICC issue should be understood remains a challenge. Specifically, perhaps ‘From Sinners to Saints’ is a somewhat misleading title for this chapter, since as has been shown, many of those who eventually voted for “UhuRuto” considered either one or both of them a ‘saint’ from the outset (regardless of the veracity of the ICC charges against them). For Ruto, this stemmed from his (along with others) alleged mobilisation of youth that forced Kibaki, coupled with external pressure, to give Odinga/ODM at least a minimal share of power (Brown 2009; Khadiagala 2008). As recounted by Odinga’s former (and at the time of writing, highly disaffected) Adviser for Coalition Affairs:

...We reminded Raila [after his falling-out with Ruto by 2009] that of all the communities that had supported him in 2007, none had acted more gallantly than the Kalenjin, especially their brave youth. Many believe, with merit, that had the Kalenjin youth not fought in defence of Raila’s ‘stolen vote’, Kibaki wouldn’t have agreed to share power with him. And it was universally acknowledged that if there was one person who deserved praise for mobilizing the Kalenjin youth during that period, it wasn’t the ODM chairman Henry Kosgey, it was William Ruto (Miguna 2012:300).

As for Kenyatta, his alleged association with the attacks in Naivasha and Nakuru likewise bestowed upon him a kind of ‘sainthood’ among the communities targeted by these same “brave youth”, given the inability of the government’s security forces to provide sufficient protection.⁶⁶ This applied not only to the Kikuyu and other ‘immigrant’/‘alien’ groups settled in what had been exclusively Kalenjin lands before and after the colonial era, but also in Naivasha town where ‘retaliatory’-violence was considered the only way that the several thousands of (mainly Kikuyu) IDPs who had sought refuge there could be protected: by showing the ODM side that their own (innocent) people, too, could suffer. Typical of such gratitude was this comment made by a resident of southern Kiambu shortly after voting in the 2013 election:

In 2007–8 Kibaki couldn’t protect Kikuyus in the Rift Valley. That’s because the security forces [after many years under President Moi] had so many Luo and Kalenjin. Even now, here [in the Limuru area], we have them, such as the O. C. S. [i.e., Officer-in-Charge-of-Station] just at our local Police station. So we don’t blame him for not being able to protect our people then.

Uhuru went to the Rift Valley [in late January, 2008] as a peace-maker, but if it was with Mungiki, then it was to save his people [from the Kalenjin who were killing them], so we support that [Personal Interview, Limuru, 4 March, 2013].⁶⁷

Or, as a local conflict resolution analyst had discovered earlier:

I have heard some people saying openly that the violence would not have stopped, had some leaders not organised, armed and sponsored their youth to attack members of other ethnic groups in Naivasha, in order to avenge the violence that was targeting [sic] their own group in the Rift Valley and elsewhere...

So deep [sic] entrenched is the problem of negative ethnicity that people, including some MPs and top politicians, whose names are likely contained in Justice Waki’s envelope for prosecution either in Kenya or at The Hague, are considered as heroes by a considerable number of members of their ethnic groups, mostly for participating in these horrendous acts (Mghanga 2010:87).

To the extent that these ICC indictees acquired this ‘victim’ persona,⁶⁸ they would be in ‘good company’ in terms of Kenya’s political history. Among the many notable leaders at the national level whose careers were launched (or given a major ‘boost’) by having suffered state oppression of one sort or another are: Jomo Kenyatta,⁶⁹ Paul Ngei, J. M. Kariuki, Oginga Odinga, Jean-Marie Seroney, Martin Shikuku, Mark Mwithaga, Abu Somo, Dawson Mwanyumba, Raila Odinga, Chelagat Mutai, Freddie Cheserek, George Anyona, Koigi wa Wamwere, Waruru Kanja, Kiraitu Murungi, Kenneth Matiba, Charles Rubia, James Orendo, Otieno Mak’Onyango, Wanyiri Kihoro, Kipruto arap Kirwa, Njeru Kathangu, Jembe Mwakalu, and Gitobu Imanyara; countless local leaders also similarly ‘benefited’, however severe the damages in the process.⁷⁰

Indeed, among those who have assessed the contribution of such victim-status to Jubilee’s victory, there is considerable agreement, including an expatriate researcher, who argued thus:

Uhuru Kenyatta and William Ruto very astutely turned the debate around the ICC indictments in their favour during the course of the election campaign. They did so in the following ways: by framing themselves as victims of the ICC, by presenting the ICC as a Western, neo-colonial plot against them and against Kenya and—in Uhuru Kenyatta's case—by persuading members of the Kikuyu community that the indictments were an acknowledgement of how he had protected their interests when they were under attack in 2008 (Kavanagh 2014:20).

For its part, a comparative conflict-resolution study of four African cases reached a similar conclusion:

...Odinga had been favoured by pollsters to win.⁷¹ However, the indictment had the unintended effect of not only drawing Kenyatta and Ruto together, but also galvanizing their two communities to vote as a bloc. They could also claim that their ticket represented the best chance for ensuring peaceful elections in the restive Rift Valley province and the country at large. During the campaigns, they portrayed the ICC as a neo-colonial, Western-manipulated institution out to determine the course of Kenyan politics...They also used to their advantage admonitions by Western diplomats that Kenyans should not elect them lest they invite dire consequences for the country. The two strove to portray Odinga as both the author and the intended beneficiary of their woes. Indeed, it can be said the two won *because* of the ICC cases (Wachira *et al.* 2014:251).

While this chapter, in common with the two analyses cited above, is unable to precisely calculate just how this issue played out at the various stages of the entire electoral process, it has sought to go beyond simply acknowledging the ICC as the key issue in the election. This was done by exploring the circumstances in which Kenyatta and Ruto came to 'enjoy' this quality of victimhood, based on certain contradictory elements embodied in the measures to resolve the 2008 post-election crisis in terms of both restoring peace and preventing a recurrence of such elite-driven ethnic conflict.⁷²

The widespread neglect by commentators (including various key actors in these events who have subsequently written about them) to recognize these contradictions (i.e., 'peace' vs. 'justice', that also includes responsibility for the 'bungled' 2007 election) was also indicated.⁷³ This applies even to one Kenyan analyst who usefully called attention to local-level/indigenous efforts at restoring at least a modicum of social harmony in the affected areas:

These ritual practices of seeking forgiveness and showing remorse found in many cultures have the advantage of increasing community introspection and may contribute to sustainable

peace. They should not however be seen as a replacement of the pursuit of justice for the victims. [Nevertheless, [t]he pursuit of locally generated solutions to conflict is more lasting, even in a rapidly globalizing nation and should not be ignored (Njogu 2011:127).⁷⁴

Whatever the merits in promoting some combination of these two laudatory objectives, the “UhuRuto’ campaign strategy succeeded because a substantial section of the electorate chose the former over the latter, and because the perceived content of ‘justice’ was so contradictory. Such overwhelming aversion to future violence is similarly evident in the finding of a 2013 post-election survey that the vast majority would prefer “the preservation of peace” as opposed to “the rightful winner” being declared (85 per cent vs. 13 per cent) if it was necessary to choose between these two presumably universal public goods (Long *et al.* 2013:151).

Such contradictions also raise the question as to the suitability of Kenya’s ‘winner-take-all’ electoral system in such horizontally-fragmented ‘plural’ societies,⁷⁵ whose dynamics tend to magnify the sort of divisions that have been evident in successive elections at both the national and local levels. Whatever the case, one may ask how many future elections will be held before a single issue dominates as did that of these ICC cases in 2013, and in the meantime, how the Jubilee government’s relations with key foreign powers will continue to be shaped by the divisions that arose (and, to some extent, remain) in connection with it.⁷⁶

Most important in the near term, however, will be the outcome of the now one-remaining (Ruto-Sang) case, and how this will affect not just the incumbent coalition at the top, but perhaps more important, ordinary Kenyans on the ground, and indeed, the publics of other African countries as well, given renewed efforts by their heads of state, through the African Union, to seriously curtail the ICC’s remit, if not to sever ties with it altogether.⁷⁷ For although the 2013 election is now past, and the case against Kenyatta was withdrawn on 5 December, 2014,⁷⁸ the issue which most concretely affected its contours and outcome is still very much alive.

This is seen, for example, in the reported continuing pressure on witnesses, apparently extending to the recent killing of a journalist in Eldoret who was investigating the case of one of those allegedly involved in such evidence-elimination efforts (Al-Jazeera America, 2015), whose disfigured body was found in a

national park a month after he was murdered (*The Guardian*, 2015). Longer term, various punitive measures have been taken against those civic groups identified as most active in support of the accountability agenda deriving from the 2008 PEV (Human Rights Watch, 2015).

More specifically related to the lone remaining case, the late admission of recanted evidence against Deputy President Ruto, together with the unsealed warrants of arrest for a second and third individual accused of bribing and/or intimidating witnesses, have raised serious concerns within his legal defence team based on the apparently increased likelihood of an eventual conviction (*The East African*, 2015). Such concerns have been reflected not just in the lengthy submission by Ruto's lawyers challenging such admissibility, but also in the plea by the African Union to join this challenge, which was granted (Capital-FM, 2015) here.

At the same time, such developments have begun to shake the foundations of the "UhuRuto" alliance, with several Ruto-aligned MPs calling (if only rhetorically) for him to contest the presidency in 2017 with Kenyatta as his running-mate, based on the assumption that a Ruto-led government would be more effective in warding off 'the ICC threat', whereupon Kenyatta could enjoy his second term as from 2022 (*The Star*, 2015). Potentially even more destabilizing would be a conviction prior to the next election, in terms of both Kenyatta's chances for re-election and the future of communal peace in the Rift Valley. Indeed, it is now being said that whereas "the ICC factor" brought the two together in 2013, it is likely to have the opposite effect as the next election approaches (*Weekly Citizen*, 2015). Such uncertainty regarding the future of the Kalenjin vote is also seen in the fact that 50 of the 190 MPs who have signed a petition to the UN to have the Deputy President's case deferred or dropped are from the Opposition, including the ODM party Chairman and Chief Whip.⁷⁹ In any event, unless his recently-filed 'no-case-to-answer' motion is accepted (thus winning an acquittal), the Ruto-Sang case now appears likely to drag on well into 2017, with the election scheduled for August of that year.

Altogether, then, and notwithstanding the greatly changed circumstances, such developments suggest 'the ICC factor' could have at least as great an impact on the next election as it did on the last.

Notes

1 The views expressed here are his own.

2 This is an excerpt from a conversation between a Kenyan researcher and a Western ambassador shortly after the election; the latter asked the question.

3 A distinction must also be made between ‘outcome’ in terms of the details as to the number of votes each candidate received and from which sections of the electorate, and more generally, who won.

4 Beyond the high level of Luhya sub-ethnic diversity, the fact that Mudavadi had been Odinga’s de facto running-mate in the previous election, yet was prepared to ‘take Kenyatta’s place’ in this election before being ‘dumped’ and deciding to stand on his own (see below), also likely contributed to this lack-lustre showing.

5 Obviously, the narrower the margin of any particular election outcome, the greater is the practical importance of each of them.

6 Maina (2013), Odora (2013) and Ongoya (2013) offered initial critical assessments of the Supreme Court’s decision; a detailed critique is provided by Harrington and Manji (2015). For assessments of the IEBC’s performance that raise questions about the official presidential results, see, *Africa Confidential* (2013), Africog (2013), Carter Center (2013), MARS Group (2013), KPTJ (2014) and KTN (2014). On the other hand, a domestic (civil society) observer group that conducted a parallel vote count (based on the results of 976 out of 31,977 polling streams) accorded Jubilee with 49.7 per cent of the vote, within a error-margin range of 2.7 per cent (i.e., between 47.0 per cent and 52.4 per cent (ELOG, 2013), though several key elements of this exercise have been questioned (Kamencu, 2014: 122–123). Additionally, it had no way of determining if any ‘extra’ (i.e., illegal) ballots had been cast, whether through multiple-voting or allowing unregistered people to vote, and is thus less than conclusive (Flottman 2013).

7 Another factor here (noted by Mueller, 2014) is the skill of the defendants’ legal teams in having the commencement of the trials repeatedly postponed on several occasions.

8 The relevant authority is Section 6 of the Constitution that deals with leadership integrity. Many had assumed that anyone indicted for a serious offense would be so barred.

9 Such relative success in CORD ‘strongholds’ had emerged in at least one final pre-election poll (Ipsos-Synovate 2013).

10 All three of Kenya’s main survey firms confirmed this in their final pre-election polls, with an Odinga-Musyoka lead of 1 per cent to 6 per cent, though with those “undecided” on this issue ranging from 2.6 per cent–6.6 per cent; only one firm (Strategic Public Relations) put the CORD team at over 50 per cent (at 51.7 per cent; Wikipedia, 2013). Another key factor was the death of cabinet minister (and former vice-president) George Saitoti in a mysterious helicopter crash in June 2012 (KTN, 2013), since his declared candidacy would have made such a run-off contest almost inevitable, barring a first round win by Odinga and his running mate—possibly Saitoti himself.

11 The phrase is Lynch’s, who concentrates her analysis on how this factor played out in the Rift Valley, where tensions between these rival (Kalenjin and Kikuyu) communities were the highest following the PEV; see also, *Sunday Nation* (2012a).

12 While certainly not the only factor that energized the Jubilee campaign (generational leadership-change for a largely youthful electorate being another leading one), its predominance after the election was widely acknowledged (Kavanagh 2014; Lynch 2014; Mamdani 2013; Olopade 2013; Wolf, 2013; *Namibian Sun*, 2013; International Crisis Group, 2013).

13 The comment was made by the interviewee’s mother during a home-visit, explaining to him how local people were planning to vote.

14 The former grouping (which is not generally part of public’s political-ethnic lexicon) includes especially the Kikuyu, Meru, and Embu, as well as others such as the Mbeere, Tharaka and Thagicu; about nine distinct groups comprise the Kalenjin.

15 Aside from these two factors, such a two-to-one advantage depended on an assumption that all would give unanimous support to the 'home-ethnic' candidates, which at least one analyst sought to rebut (Kanyinga, 2013). The results from Ipsos' last pre-election survey are less than convincing in this regard; while 94 per cent of Luo indicated they would vote for CORD, and 90 per cent of those in the Mt. Kenya grouping expressed an intention to vote for Jubilee, only 86 per cent of Kalenjin respondents did so, though 'late-hour' ethnic-vote consolidation cannot be ruled out. Post-election, based on constituency-level tallies (by the author), it appears that about 10 per cent of Kamba voted for Jubilee. Note, however, that a year before the election—and just after the confirmation-of-charges by the ICC—Kenyatta enjoyed only 60 per cent of such expressed support from Mt. Kenya respondents (with 8 per cent backing Odinga, 7 per cent Karua, and another 16 per cent undecided), with about the same (modest) level of Kalenjin support for Ruto: 57 per cent (leaving 8 per cent for Odinga and 15 per cent undecided). Such figures compare with 87 per cent backing for Odinga among his Luo in the same mobile-phone ('CATI') survey (Ipsos, SPEC Barometer Survey, 2012, 20 February).

16 Perhaps 'blind' is an overstatement; as Lonsdale has reminded us: "A long history of mistrust marks the gulf of opportunity between those the state favours and those it excludes. Mutual suspicion governs political practice. It puts a premium on local electoral solidarity fearful of dissent within an ethnic constituency...Deep questions of accountability from below are better unheard" (2004: 80).

17 After the election, various factors beyond both the 'numbers' and the ICC issue were cited which also purportedly buttressed the winners' eventual advantage: Jubilee's massive expenditure; its savvy and less contentious party (TNA and URP) nominations and finely-tuned 'deals' with clan leaders in certain pastoralist communities; Odinga's two lack-luster presidential debate performances; alleged misuse of funds intended for the campaign by the CORD team and more general disorganization regarding campaign planning and logistics; Odinga's diminished 'outsider' image having enjoyed 'incumbent' (prime minister) privileges; his tardiness in identifying a running-mate (who was less than fully successful both in fitting comfortably with his own 'radical' image and in maximizing voter turnout even in his own ethnic turf); and CORD's overconfidence of the inevitability of a second round run-off based on the opinion polls, resulting in their setting aside certain campaign resources during the first round (Wolf, 2014; Kabukuru 2013; Muluka 2013).

18 Source: IEBC Registered Voters-Calculation by the Author.

19 As suggested, this violence was comprised of several distinct categories: (1) largely spontaneous attacks by Odinga supporters in Nairobi, Kisumu and a number of other mainly urban centers, especially on property but also on perceived Kibaki supporters, that broke out immediately to express a rejection of the presidential results; (2) police shootings, mainly of these ODM protestors, likewise (mostly) in urban areas; (3) a combination of spontaneous but also more organized attacks mainly by Kalenjin 'militias' on Kikuyu and other perceived PNU supporters/ 'foreigners' in the central-north Rift Valley; and, (4) 'retaliation attacks' in Naivasha and Nakuru (two south-central Rift Valley towns) by Kikuyu youth-militia, brought in by convoy-transport from Nairobi and southern Central Province, aimed at ODM/Odinga supporters, especially Luo and Luhya, as well as several of the few Kalenjin residing in those locations. As was documented (by the Waki Commission, and others), various localized grievances also fed into elements of this violence, especially on the opposition side after it became clear the initial goal of over-turning the election was unobtainable (Katumanga 2010).

20 As Human Rights Watch argued: "The TJRC can contribute to Kenya's truth-seeking and healing process, but it is no substitute for judicial accountability" (2011: 78). In the event, all it did was to recommend that the Director of Public Prosecution take up a number of cases, but not those of the recently-inaugurated president and his deputy, "because they are facing the same charges before the International Criminal Court" (*Daily Nation*, 2013c).

21 Questions about the ICC were asked only to those respondents who could name at least one of the two main suspects (i.e., Kenyatta and Ruto). This proportion increased from just over 80 per cent in December, 2010, to around 90 per cent in February, 2013.

22 In addition to Kenyatta and Ruto, they included ODM Secretary-General and cabinet minister Henry Kosgey, Head of Civil Service and Secretary to the Cabinet, Francis Muthaura, Police Commissioner Hussein Ali, and radio journalist Joshua arap Sang. This same survey (i.e., December, 2010) found that 41 per cent were "very confident" that those named would be convicted, with only 17 per cent considering this eventuality "very unlikely"; additionally, 73 per cent supported the proposition that those named should immediately resign from public office. More ominously, an Infotrak survey found that while 67 per cent were not prepared "to vote for the Hague suspects" in the next election, only 51 per cent were "satisfied" with the 'Ocampo-Six' list; 35 per cent were "not satisfied" and 14 per cent were "unsure" (*Saturday Nation*, 2010).

23 For all but the last two surveys which entail a margin-of-error of just ± 1.76 per cent based on 6,000 respondents, the error-margin is ± 2.2 per cent (based on samples of about 2,000). Note that even limiting the last, pre-election survey to registered voters which gave a slight ‘boost’ to Jubilee supporters, made minimal change in the overall, national figure.

24 In five of these surveys, the question was a preference-choice between the ICC, a local tribunal, and forgiveness-amnesty (Dec. 2010, April, 2011, July, 2011, Oct. 2011, and Feb. 2013), while in the other two it was simply one of being “happy” or “unhappy” with the ICC’s involvement (Dec. 2011, April 2012). All but one of these surveys used household/face-to-face interviews; the exception (Dec. 2010) used mobile phone interviews, based on phone numbers (likewise distributed across the country according to population) obtained from previous household interviews on various topics undertaken by the company. Source: Compiled from Ipsos-Synovate SPEC Barometer surveys (October 2010–February 2013). Ipsos purchased Synovate in 2011 (which had purchased The Steadman Group in 2008). This hyphenated name was used until mid-2014 for legal reasons.

25 This appears to be the only conclusion to be drawn from the fact that (based on data from an early-2014 survey) 25 per cent of those who expressed support for the continuation of Ruto’s trial were “certain” that he would be acquitted (Ipsos, 2014).

26 As suggested by the survey figures cited above, initially it was the PNU side of the Grand Coalition Government (personified best by Justice and Constitutional Affairs Minister Martha Karua, a member of the Kibaki’s team in the ‘Serena’ mediation talks) that argued most vehemently for accountability, while the ODM side promoted amnesty, as Odinga did when he insisted that the “thousands of youth who were arrested and detained...were exercising their democratic right to demonstrate against a stolen election and therefore committed no offence” (Wachira et al., 2014: 122). See also the Waki Report (2008: 463) for a summary of these contrasting positions.

27 Various earlier highly symbolic indications of resistance to the ICC’s version of accountability could be cited, including: the invitation to/appearance of ICC-indictee President Omar al-Bashir of Sudan at the promulgation ceremony of Kenya’s new constitution in August, 2010—in blatant violation of Kenya’s Treaty of Rome commitments—which only became known on the day of Bashir’s arrival (The Guardian, 2010). Earlier that year, Vice-President Musyoka had attended al-Bashir’s inauguration ceremony in Khartoum. Closer to the election, such signals continued in abundance, among them Annan’s failure to secure a meeting with Kibaki during a three-day visit to assess the reform process in mid-October, 2012 (*Daily Nation*, 2012b).

28 These figures are from the same surveys cited for Fig. 2.

29 76 per cent of those who had followed these hearings felt they had been conducted “fairly”, though with nearly a 20 per cent gap between respondents in Nyanza (93 per cent and those in Central (58 per cent) and Rift Valley (54 per cent). Such confidence in the Court’s integrity, together with the visibly vigorous performance of the defendants’ legal teams—thus encouraging confidence that the cases might soon be terminated and/or (eventually) dismissed—evidently moderated opposition to its involvement at this time.

30 While there is no obvious explanation for this, it may be a reflection of the fact that a Kenyatta presidency held the promise of a reduction (if not the elimination) of the ICC threat for Ruto, especially given Jubilee’s steadily rising poll numbers, and their increasing confidence of a first round victory.

31 As noted above, at least at the time of Ipsos-Synovate’s final pre-election survey, in neither of the main pro-Jubilee communities was expressed voting-support for ‘UhuRuto’ unanimous; the same applied to CORD.

32 Their previous lukewarm support evidently reflects the fact that until 2012, as Kibaki’s vice-president, he had dutifully served the anti-ICC cause by making numerous international ‘shuttle-diplomacy’ visits in an (ultimately futile) effort to have the cases dropped, or at least suspended. Indeed, as a key member of the ‘G-7’ group that early on sought to mobilize opposition to Odinga’s presidential bid, many assumed should the ICC cases prevent Kenyatta and Ruto from contesting, he would be put forward as Odinga’s chief opponent (Muluka, 2011:58). Confidence in him was apparently eroded among its leaders, however by the increasingly vociferous calls in support of The Hague option by fellow ODM-Kenya minister for Justice, Constitutional Affairs, and National Cohesion, Mutula Kilonzo—who went so far as to name one of his pet cheetahs after the Chief Prosecutor, and their cage, ‘The Hague’; *Daily Nation*, 2011; indeed, he later claimed it would be “immoral” for anyone to associate themselves with the accused if the charges against Kenyatta and Ruto were confirmed; *The Standard*, 2012c). In the event, even before their bids to have their candidacies approved (whether by the IEBC or the judiciary), in August, 2012 Musyoka claimed that he and Ruto had agreed on a joint-ticket, presumably with himself as the presidential candidate (*Sunday Standard*, 2012).

33 Such contrasting expectations about their trial-attendance helps to explain the additional finding that 25 per cent of those intending to vote for Jubilee thought it would be impossible for the ICC-indictees to “run the government from The Hague” if they won (even if more than three times as many of those prepared to vote for CORD—80 per cent—held this same view). It was this issue that gave Odinga perhaps his highest moment in the second televised presidential debate, when he claimed that it would be impossible for the Jubilee team to “run the government by Skype” from The Hague (Kabukuru, 2013).

34 For details of the exit poll results, see, Ferree et al (2014). Although impossible to judge how widespread it was, this view expressed by a voter in Kiambu makes the point: “If Uhuru wins, the ICC will just disappear, but if Raila wins, he’ll be sure to arrest both him and Ruto” (Personal Interview, Limuru, 4 March, 2013).

35 Indeed, it may be asked whether Karua and Peter Kenneth (both from Central Kenya) would have launched presidential bids had the ICC case not been hanging over Kenyatta. Many of the lingering uncertainties and possibilities were viewed as dependent upon the outcome of the ICC status conference held in mid-2012 (*Sunday Nation*, 2012b).

36 Presciently, however, Warigi went on to suggest that “...the ICC matter is hurting the ODM leader almost as much...Those who are backing Mr Ruto have been driven into a marriage of convenience with the PNU, and specifically Mr Kenyatta, with the sole intention of stopping the prime minister’s political ambitions dead in their tracks.” Among the few who immediately saw that the confirmation of charges against ‘UhuRuto’ would likely enhance their electoral prospects were Onyango-Obbo (2012) and an Ipsos-Synovate survey researcher (VOA News, 2012).

37 Though in an ‘Afterword’ comment annexed following the confirmation of charges on 23 January, 2012 against four of the six initial suspects including especially Kenyatta and Ruto, Hansen noted that “...the political landscape in Kenya will continue to be dramatically affected by the ICC cases, likely increasing already existing tensions” (2011: 34).

38 For example, a Jubilee campaign aide insisted that Kenyatta “would never have been allowed” to have Ruto as his running-mate if Kikuyu notables/former cabinet ministers Njenga Karume and John Michuki had not both died (of natural causes) at the beginning of 2012, as neither had forgiven him for his role in the PEV (Personal Interview, Nairobi, 22 April, 2014).

39 On 15 February, 2013 the High Court rejected the petition filed by a local NGO with this objective (*Daily Nation*, 2013b; VOA News, 2013). Earlier, the IECB had claimed that the authority to determine this issue rested with it alone, and only after nomination papers had been filed; when the Jubilee team did so, on 30 January, 2013, however, it raised no objections.

40 One unrelated additional ‘hurdle’ for Kenyatta was the assumption among some, including important figures close to Kibaki, that due to ‘Kikuyu fatigue’ an insufficient proportion of the electorate could countenance having one member of this ethnic group succeed another, given that half of the country’s fifty years of independence had already been under ‘Kikuyu rule’. This—in addition to the trepidation among certain elements of the Kikuyu business class regarding possible (Western) sanctions triggered by electing the ICC defendants—was the main motivation behind the effort to have him stand aside in favour of Mudavadi, but which collapsed within days of its formulation (Capital-FM, 2012). Two years after the election, Kiambu Governor William Kabogo took ‘credit’ for sabotaging it (*Daily Nation*, 2015).

41 These results were compiled from Ipsos-Synovate SPEC Barometer surveys conducted during April 2009–February 2013. The verbatim question through the end of 2012 was: ‘If the next election were held now, aside from President Kibaki, who would you vote for, if that person was a candidate?’ As noted above, for the last two (2013) polls, the question was: ‘Which pair of candidates for president and deputy-president do you intend to vote for?’ The combination of the removal from the calculation of those who stated they were still undecided at the time of the final (mid-February, 2013) survey (about 3 per cent) and its margin-of-error (about 1.3 per cent), put Jubilee within a 45.1 per cent–47.7 per cent range (Wolf, 2014: 64). For reasons of visual clarity, percentages are shown for only the top two candidates, their (eventual) deputy president running-mates, all others combined, and those who preferred no one/were still undecided.

42 The U.S. State Department quickly acknowledged Kibaki’s ‘victory’, but with the violence mounting, hardly a week later the U.S. ‘threatened’ direct international intervention if the two sides did not begin negotiations immediately” (Khadiagala 2008: 11). It remains unclear whether the initial announcement reflected a preference for Kibaki, or rather, only for ‘stability’. At the same time, these (Western) external actors were not in agreement at all stages of the crisis. For example, prior to the start of the negotiations, the Europeans were more sympathetic to Odinga’s insistence on revisiting the election results than were the Americans (African Union, 2014: 22), with British prime minister Gordon Brown particularly supportive on this (Miguna, 2012: 216). Even prior to the election, however, there is evidence that Ranneberger was committed to a Kibaki win, though whether

this was only the Ambassador's personal preference, rather than the U.S. government's, is unclear (Flottman 2015).

43 Efforts undertaken to achieve this end were not limited to persuasion. Relevant here was the car-jacking of Imenti-Central MP Gitobu Manyara on his way home from parliament early in 2012, who was then forced, with a machete pressed against his head, to face Mt. Kenya and swear loyalty to Kenyatta's presidential bid (*The Star*, 2012). His assailants were never apprehended.

44 Although Kibaki had obtained about 45 per cent of the vote, by June, 2008, only 25 per cent of all Kenyans thought he had won the election (as compared with 57 per cent for Odinga; Gallup, 2008). This suggests that a substantial proportion of those who had voted for the former six months earlier had come to believe that he had lost.

45 The vast majority of Kenyans apparently agreed. In a more recent survey, 76 per cent expressed the view that without the PEV no power-sharing government would have emerged, with a significantly higher figure for Nairobi (89 per cent), where more people have access to relevant information (Ipsos-Synovate 2013).

46 A local governance group evaluation issued this verdict on the Kriegler Commission report: '[It] is an inadequate job that attempts to cover up offenses committed by people who deserve no such protection'; see, KPTJ, 2008. As noted, the International Republican Institute exit poll conducted under the supervision of a team of American academics gave Odinga a definitive win (Gibson and Long, 2009), but it was 'conveniently' embargoed for six months, reportedly at the behest of U.S. government officials, starting with its ambassador in Nairobi (Flottman 2014). The Kriegler Commission did receive testimony from the two academics involved, but drew no firm conclusions from it (Republic of Kenya, 2008: 137).

47 Also of significance here was that in contrast to the Waki Commission (see below), the Kriegler Commission included two members directly appointed by each of the rival political parties. As such, according to a lawyer who followed the matter closely, "the most radical thing they could have done was to recommend that the ECK be disbanded; imposing any individual responsibility for 'election-theft' was never going to be a realistic option" (Personal Interview, Nairobi, 1 July, 2015). In addition, there was the thorny issue of constitutional presidential limits, which would have required amending to allow Kibaki to contest a 'third term', and which the mood at the time would have made it high unlikely for him to win.

48 Kenya had ratified the Rome Treaty in 2005, the ICC then becoming part of the nation's judiciary through passage of the International Crimes Act of 2008. This understanding was confirmed in discussions between the Prosecutor and Kenya

government officials in mid-2009, when it was still assumed that these cases would arrive at The Hague through self-referrals; and which the former would have preferred see, Müller and Stegmiller, 2010:1294.

49 In the words of one of the PEV victims in Narok: "To avoid a repeat of such kind of violence...the government should investigate how the election was conducted and those who caused the violence should be prosecuted" (Njogu, 2009:144). A more inclusive approach might have involved some form of truth and reconciliation process, but that would have required each side to have acknowledged its 'guilt': that the Kibaki side had stolen the election, and that at least some elements on the Odinga side had deliberately employed violence as a way to challenge the official result. For some of the perceptions and considerations involved on the Odinga side, see Miguna (2012: 199–223); for a more general discussion of this option, see, KPTJ (2010).

50 Many observers subsequently noted the irony that it was primarily through the mobilization of MPs allied to Kenyatta and Ruto that the 'Hague' option won the day, a position that Ruto defended openly (*Sunday Nation*, 2009).

51 Moreno-Ocampo later revealed that he had resisted "pressure from certain diplomats" to ensure that Kenyatta and Ruto were barred from contesting, insisting to them that the Kenyan judiciary, not he, would make that decision since "that was not my job" (Daily Nation, 2014a).

52 Well after the election, Ruto credited Eldoret (Kalenjin) Catholic Bishop Cornelius Korir for having made it possible for him and Kenyatta "to work together" prior to the 2013 election (*Sunday Nation*, 2015).

53 For example, USAID's Office of Transition Initiative's (OTI) program allocated some \$3.5m in 110 grants during 2008–13 to various religious and other non-governmental organizations for such 'peace-building' efforts in the Rift Valley; the average grant was about \$32,000 (Personal Communication, Senior Official, USAID/OTI Office, Nairobi, 8 September, 2013).

54 For his part, Maupeu (2014) has described these developments as the 'Pentecostalisation' of the ICC issue.

55 By the end of 2011, only two minor cases had been successfully prosecuted (Human Rights Watch, 2011). Over a year later, a local NGO that had tracked this issue concluded that: "Despite numerous claims made by various government officials...there has been almost no accountability for PEV crimes...[and] at present there appears to be no feasible and credible plan on dealing with the files and cases relating to the PEV" (KPTJ, 2013: 8). Nichols, after providing a more recent and detailed summary of such dismal domestic accountability efforts, in which he notes that "no politician, businessman, religious leader or tribal elder was ever held accountable at the local

level for their role in organising the violence”, reached a similar conclusion: the strategy of “positive complementarity” pursued by the Office of the Prosecutor (OTP) “had little or no impact in serving as a catalyst for domestic prosecutions” (2015:102).

56 Interviewed on al-Jazeera in January, 2013, Kenyatta made the same argument (*Daily Nation*, 2013a).

57 With specific reference to the National Accord, however, Miguna could still lament that, “There was nothing about how the coalition government would deal with the security forces who had mowed down thousands of unarmed and innocent Kenyan civilians; and nothing about the tens of thousands of youth who had been arrested and whose whereabouts were unknown to their loved ones (2012:249). According to a consultant for Nairobi-based humanitarian relief organization King, B. (2008), however, some 1,000 Kalenjin youths were quietly released the following month as the result of a ‘presidential pardon’.

58 Whether Rawlence actually expected that principle rather than politics would determine ‘the course of justice’ is unclear.

59 For example, while Ruto entered politics as a YK-92 (‘Youth for KANU in 1992’) activist aimed at keeping Moi in power, Odinga served several stints in detention at the hands of this very government (even if he later joined it, a year before the 2002 election).

60 The fact that all three of those indicted on the ODM side of the ‘ledger’ were Kalenjin—loudly leaving Odinga’s ‘own’ Luo ‘untouched’—only exacerbated this imbalance. Moreover, that the case against Kosgey—a senior Kalenjin political figure who did not part ways with Odinga—was later dropped (following the Confirmation of Charges proceedings in January, 2012) had a similar (if minor) effect. Although apparently a staunch Ruto ally throughout this period, Sang took many observers by surprise when he announced his support for Odinga barely two weeks before the 2013 election (*The Star*, 2013b). While praising him as a unifying figure and defender of the new constitution, Sang was seen by some as simply seeking state protection from The Hague, having assumed that Odinga would shortly become president (Personal Interview, Nairobi, 14 March, 2013).

61 Several years later, these and more recent issues, including especially the ICC, were explored with an eye on the then-forthcoming election by Muluka (2011).

62 This event, in February, 2010, was described as the “point of no return” in their relationship. In the same breath, Odinga likewise sought to suspend minister Sam Ongeri to “pave the way” for corruption investigations in their respective ministries (Agriculture, Education), though both were immediately reinstated by Kibaki (*Mail & Guardian*, 2010). Ruto was subsequently removed from the Cabinet in October—officially by Kibaki, but clearly with Odinga’s consent. According to one observer, “The relationship between Odinga and Ruto is now beyond salvation” (*Newstime Africa*, 2010). He was later appointed Minister for Higher Education by Kibaki, but was “suspended” in October, 2010 due to corruption charges related to a 2004 land case (four days after which he said he “would not resign” over the same issue (*Daily Nation*, 2010). He was acquitted on these charges in April, 2011, but was again sacked from the Cabinet on 24 August, 2011, after the charges against him were confirmed by the ICC. Kenyatta, by contrast, while resigning as Finance Minister, refused to step down as Deputy Prime Minister on the grounds that this position, like that of prime minister and president, was protected by the Constitution as part of the National Accord (*Saturday Nation*, 2012). Beyond Ruto individually, ODM party matters also took their toll, such as the attempted expulsion of two close Ruto parliamentary allies early in 2011 for their alleged increasing association with PNU (*Sunday Standard*, 2011).

63 To this end, for example, documents (later determined to be ‘fake’) were introduced into parliament purporting to reveal a ‘plot’ by the British government to have Kibaki arrested and taken to The Hague as well, a claim swiftly refuted by both its High Commission in Kenya and the Foreign and Commonwealth Office in London (*The Standard*, 2012a). Even more bizarre, a British MP (Ian Paisley) joined the anti-ICC crusade claiming that the Kenya cases were instigated by the West so as to “clear the way for Odinga to ascend to power” (*Daily Nation*, 2012a).

64 The story was quoting an unnamed Jubilee campaign official.

65 This is not to say that issues have had no salience at all in other elections. For an effort to quantitatively assess the ‘balance’ between ethnic identity and issues in the 2007 presidential contest, for example, see Bratton and Kimenyi (2008). Note, however, that they make no distinction between those voters who did/did not have a (credible) fellow-ethnic in the race.

66 Such perceived involvement undoubtedly helped him discard the negative image as Moi’s ‘project’ that he had acquired during his 2002 presidential bid, losing to Kibaki by a 2-to-1 margin.

67 Earlier, a (Kikuyu) resident of Naivasha put it this way: "...[T]he Naivasha violence started as revenge to show other people that we could also fight and defend our own" (Njogu, 2009: 311).

68 Several years after the election, KANU Secretary-General Nick Salat described his Kalenjin community's support for Ruto in the 2013 election as "protective", adding that: it "...was about uniting the two leaders who were before the ICC. It was like saying we are giving you this weapon [of state power] to go and wriggle yourself out" (*Saturday Nation*, 2015).

69 To some extent, the next two presidents also earned a certain amount of sympathy as 'victims': Moi for the humiliation he periodically experienced as Kenyatta's vice-president—including the attempt to block his constitutional ascent to power shortly before Kenyatta's death—and Kibaki for his demotion from the vice-presidency by Moi in 1988, and later (if indirectly) the deadly attacks on a section of his community following his filing of an election petition against Moi in 1998.

70 The degree of communal as opposed to just individual 'victimhood' varies among all mentioned, however. The role of 'moral ethnicity' when such victimization results from defending such communal rights has been explored by Lonsdale (2004) and Klopp (2002).

71 As shown above, this statement is untrue: all the mainstream pollsters had put the two main candidate-pairs in a statistical tie.

72 Branch and Cheeseman (2009) consider the origins of this break-down of 'elite consensus', while Zeleza's analysis (2008) explores even deeper historical issues.

73 Examples of such analytical 'neglect' include, African Union (2014), Lindenmayer and Kaye (2009), Cohen (2008), Mwagiru (2008) and Aman (2008). A notable exception is Branch, though he makes no link to the 'moral inversion' that occurred with regard to the ICC cases (2013: 280-281).

74 Waiyego and Wokabi (n.d.) provide some perspectives from the PEV victims, based on interviews they conducted in IDP camps.

75 Chweya (2002) is one of the few who has interrogated this issue, doing so shortly before Kenya's third election after the return to multi-party politics in 1992. For a comparative collection of the impact of democratization on ethnic conflict, see Glickman (1995).

76 Among many examples, note the accusation levelled at the U.S. government by the head of Kenya's intelligence agency in February, 2014 (*Daily Nation*, 2014b), as well as President Kenyatta's own published views on the ICC on the eve of the African Union Heads of State conference in January, 2015 (Kenyatta, 2015).

77 At their summit in Addis Ababa at the end of January, President Kenyatta insisted that the ICC "poses a grave risk to peace and security not only in Africa, but to the whole world" (*The Standard*, 2015a).

78 As the Chief Prosecutor did this "without prejudice", there is at least a theoretical possibility that if new evidence becomes available, the case could be reinstated. Her initial request for an adjournment of the case was denied (Allison, 2014).

79 The main reason for the deferral demand is 'to allow for an independent investigation into the credibility of prosecution witnesses' (*The Standard*, 2015b).

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The ICC and Kenya's 2013 Elections: A Perspective from Kenyan Newspapers Editorial Cartoons

SAMMY GAKERO GACHIGUA

Introduction

The involvement of the International Criminal Court (ICC) in Kenya is one of the processes in the recent past that has had a long-running and significant impact in the trajectory of politics in the country, and no less so on the March 2013 General Election. This chapter seeks to investigate how editorial cartoons published in four national newspapers between 2009 and March 2013—*Daily Nation* (Gado), the *Standard* (Kham), *People Daily* (Celeste, Mwalimu and Tum) and the *Star* (Victor and Ozone)—depicted the ICC involvement in Kenya and the political elite's reaction to that during the period leading to the 2013 general election. In so doing, the chapter seeks to interrogate the cartoonists' reading of the two sets of processes in order to assess how the processes impacted the democratic culture and practice in the country.

The ICC involvement in Kenya was prompted by the recommendations of the Commission of Inquiry into the Post-Election Violence (CIPEV), which recommended that the coalition government—formed after the negotiated settlement of the post-election violence (PEV) under the auspices of Kenya National Dialogue and Reconciliation (KNDR) process—institute legal mechanisms to form a special hybrid tribunal composed of local and international judicial officials to investigate and prosecute cases arising from the PEV. However, powerful actors within the government scuttled the various attempts despite repeated

extensions of the agreed deadlines for the formation of the tribunal (Kenyans for Peace with Justice and Truth [KPJT] 2013:5–11).

In exasperation, Kofi Annan handed over the envelope containing the names of the suspected masterminds of the PEV and the evidence collected by CIPEV to the ICC Prosecutor Luis Moreno-Ocampo on July 9, 2009. On November 26, 2009, the ICC prosecutor filed a request seeking authorisation from the Pre-Trial Chamber II to open investigations into the crimes committed during the 2007–2008 post election violence, which was granted on March 31, 2010. On December 15, 2010, Ocampo named and issued summonses for six individuals suspected of bearing the greatest responsibility for the PEV. They were accused of crimes against humanity. The six were enjoined in two cases. The then cabinet ministers William Ruto and Henry Kosgey, as well as the Kass FM Radio presenter Joshua Arap Sang comprised the first case. The second case comprised the then Finance Minister Uhuru Kenyatta, then Secretary and Head of Public Service Francis Muthaura, and former Police Commissioner Hussein Ali. The suspects in the first case were associated with Prime Minister Raila Odinga, while those in the second case were associated with President Mwai Kibaki—the leaders of the antagonistic parties (Orange Democratic Movement—ODM and Party of National Unity—PNU) respectively and the then co-principals of the coalition government.

The naming of the six suspects unleashed an unprecedented flurry of activities among the local political elite that targeted local and international publics and actors with the aim of either scheming for personal and political survival, or in calculation about how to strategically use the ICC indictment—either in support of or against the ICC—to secure political power.

The turning point of this flurry of activities was the formation of a political merger between Uhuru Kenyatta and William Ruto (dubbed UhuRuto)—the former political allies in 2002, political adversaries in 2007 and then ICC indictees and political allies again in 2012. They created the Jubilee coalition that contested and won the 2013 presidential elections. The UhuRuto merger prompted Raila Odinga and Kalonzo Musyoka—political adversaries in the 1990s, political allies in 2002, adversaries in 2007 brought together in an uneasy relationship in the Grand Coalition as Prime Minister and Vice-President respectively of the then coalition government—to form a surprise partnership in 2013 under the Coalition of Reform and Democracy (CORD).

This chapter discusses editorial cartoons as an important multimodal genre documenting and critiquing socio-political issues in the next section. It also analyses editorial cartoons that depicted the twin issues of the ICC and the 2013 General Election.

Editorial cartoons

Editorial cartoons are a distinct multimodal media genre—combining the graphic and linguistic—that are published in the editorial page of newspapers. Editorial cartoons draw their content from everyday socio-political occurrences but are presented artistically. As such, editorial cartoons operate simultaneously at two distinct levels: the real-life and the fictional (El Refaie 2009:186). The two levels are connected metaphorically through—among others—exaggeration, juxtaposition, incongruity, grotesquery and allusion—which often evoke humour (Musila 2007:101, 104, 106). Through the synthesis of the real life and the fictional, editorial cartoons can powerfully and creatively document socio-political events as well as make moral judgments of the events they depict (Eko 2007:222; Swain 2012:82). This enables audiences to see the depicted events from new angles that potentially expose ‘essential truths’ of events (El Refaie 2009:186). In so doing, the cartoons have both the potential of communicating what is difficult or impossible to express verbally (Mazid 2008:437), and that which factual forms of communication find difficult to convey (Musila 2007:115). Through this unique potentiality, editorial cartoons appeal to the intellect, conscience and emotion (Göçek 1998:2).

Editorial cartoons are an established and popular genre in the Kenyan newspapers. They have been instrumental in helping open up the political space in the country (Katuni 2004:36–7, Gathara & Wanjau 2009:278–281). Through humour and satire, editorial cartoons have helped push the limits of political, religious and racial taboos (Musila 2007:114–5). In addition, editorial cartoons have chronicled, interrogated and critiqued contemporary socio-political occurrences such as Kenya’s military fight against Al-Shabaab in Somalia, and the evolving perceptions of the ICC involvement in Kenya between 2009 and 2014 (see Gachigua 2013, 2014).

In the next section, I examine editorial cartoons that depicted the twin issues of the ICC and the 2013 Kenyan elections.



Fig. 1 Gado 03/06/2008

Editorial cartoons on the ICC and the 2013 elections

As Kofi Annan mediated the end of the PEV in early 2008, a raging controversy emerged between the ODM and PNU about how those involved in the violence should be treated. As enacted in Fig. 1 caricaturing Mwai Kibaki and Raila Odinga, whereas ODM firmly held that the suspects should be granted unconditional amnesty arguing that acts of violence committed were a protest against a stolen election, PNU firmly contended that serious crimes had been committed which warranted prosecution (CIPEV 2008:62–69). As will be shown in cartoon depictions, these positions and their proponents would dramatically shift in the intervening period, setting off a series of contradictions that starkly exposed the depths of amoral deftness as the political elite in Kenya played around the twin processes of the ICC and the 2013 elections.

By the beginning of 2009 when the coalition government attempted to pass legislation that would create a hybrid tribunal to investigate and prosecute the PEV suspects, sections of MPs from PNU and ODM in defiance of the pleas by the coalition principals voted against the attempt. Some did so arguing that the bill did not provide sufficient independence to the tribunal (KPJT 5), while others did so at the behest of influential MPs adversely mentioned in the CIPEV report. The latter group reasoned that the ICC option was politically expedient for them in varied ways. For instance, as Brown & Sriram (2012:252–3) observe, some

feared that the local tribunal would actually be effective in prosecuting and convicting MPs implicated in the violence or their close allies whereas the ICC prosecution seemed a distant possibility. The most outspoken of this group were those allied to William Ruto, who by mid 2009 openly defied the official ODM stance that supported the formation of the special tribunal, as caricatured in Fig. 2, and would coin the catchphrase—*Don't be Vague Go to The Hague* to register their defiance. At this point, public opinion was torn between supporting the constitution of a local tribunal, taking the Kenyan PEV cases to The Hague, or handling them through a Truth Justice and Reconciliation Commission. The confusion among the public is caricatured in Fig. 3, which the elite are depicted celebrating as they seemingly sought ways to evade being held accountable for the PEV. As the ICC prosecutor sought to secure the court's authority to investigate the PEV cases, the Internally Displaced Persons (IDPs) seemed genuinely convinced that the ICC offered the only viable option to resolving their predicament (Fig. 4).



Fig. 2 Kham 03/07/2009



Fig. 3 Kham 12/08/2009



Fig. 4 Mwalimu 05/11/2009

On the other hand, Moreno Ocampo’s taking up of the Kenyan cases and the lead up to securing the authority from the Pre-Trial Chamber II on March 31, 2010 caused extreme anxiety among the political elite who feared that they may be implicated in instigating the PEV (Fig. 5, 6 and 7).



Fig. 5 Mwalimu 02/11/2009



Fig. 6 Gado 05/03/2010



Fig. 7 Kham 02/04/2010

Coupled with extreme anxiety were the elite intensifying in scheming to parry ICC investigations and possible prosecutions. As most stridently demonstrated in cartoons by Kham, William Ruto of ODM was dramatically cozying up to President Kibaki of PNU, the former bitter adversary in 2007 (Fig. 8), apparently setting the stage for what would later be termed as the ‘alliance of the accused’ (Lynch 2014, Fig. 24) as presaged in Fig. 9. Further, as Fig. 10 depicts, there were early attempts in 2010 at setting up Raila Odinga as the object of vilification, as a traitor who was working with the imperialistic forces to torment his countrymen—a political strategy that rode on discourses of victimhood of the accused that would dominantly figure in 2012 (Brown & Raddatz 2014:51). In

2007

STOP! YOU VIOLATE THE ELECTION!

2010

OH GREAT AND WISE ONE YOU'RE A GENUINE LEADER!

I KILLED YOUR PEOPLE
IN BURNT FOREST AND YOU
KILLED MINE IN NAIYASHA.
DO YOU KNOW WHAT
THAT MEANS?

YES! EASY...
YOU AND I MUST ENTER AN
ALLIANCE TO GET POWER
... AND THEN WE SHALL
BE SAFE!

[illegible]

Over the same period Ocampo was reported to have made the remark that he would make Kenya a world example on managing violence (BBC News), as caricatured in Fig. 11. The comment would be the first of the two sets of remarks that would be extensively used to bolster the Jubilee position that the ICC process and Ocampo were pursuing an imperialistic mission to fix some politicians and prevent them from contesting the 2013 presidential elections, again furthering the discourses of victimhood. This interpretation was reinforced when in January 2013 the British High Commissioner Christian Turner stated that the UK would only maintain essential contact with Kenya if Uhuru Kenyatta and William Ruto, the Jubilee candidates, were elected. The US Assistant Secretary Johnny Carson's remarks in February 2013 that "choices have consequences" served as a warning against Kenyans electing the Kenyatta and Ruto

duo and subsequent statements by Western diplomats buttressed the notion that the Western powers wanted to impose their choice candidate, widely interpreted as Raila Odinga, on Kenyans.

However as the UhuRuto campaign latched on to these statements to project themselves as ‘protecting Kenyan sovereignty’ against Western imperialistic designs (Brown & Raddatz 2014:51), it was not lost on keen observers that the Jubilee campaign retained the British based firm—BTP Advisors—to craft the anti-ICC message. At the same time Uhuru Kenyatta heavily relied on UK based attorneys for his defense at the ICC. That the Western powers for strategic reasons were not only unable to see through their threats of consequences on the election of UhuRuto, but that they were awkwardly forced to deal with the duo, exposed the emptiness of their threats which were grudgingly sidestepped at the expediency of protecting the economic and security interests of the Western powers in Kenya (See Brown & Raddatz 2014:54). Fig 12 caricatures the contradictory stances of the Western powers towards Kenya in the pre- and post 2013 elections that the Jubilee leaders seemed to have gleefully surmounted, probably as they had accurately anticipated that the Western powers played by the same amoral pragmatic principles as the local elite.

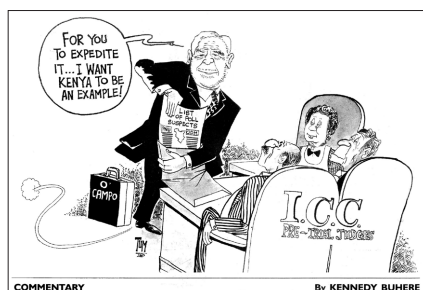


Fig. 11 Tum 05/03/2010

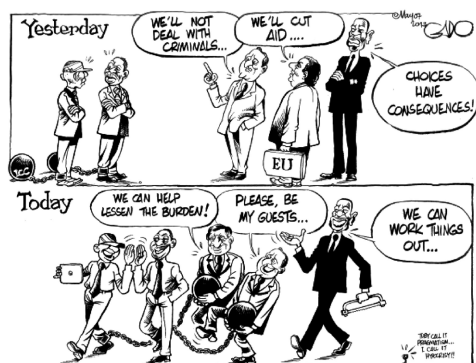


Fig. 12 Gado 07/05/2013

By mid 2010, the divergent positions between the Odinga-led ODM and PNU regarding the ICC process had sufficiently hardened to precipitate an embarrassing clash at the Review Conference of the Rome Statute in Kampala (Fig. 13), where both ODM and PNU sent different sets of government delegations that bickered openly. PNU sought to push for the deferral of the Kenyan cases at the

ICC—which Mueller (2014:11–13) discusses as one aspect of ‘a mega-strategy’ to defeat any prosecution of PEV cases, while Raila Odinga’s ODM opposed the deferral. PNU’s position was now a radical shift from that held in 2008 and captured in Fig. 1, which had firmly advocated for the prosecution of PEV cases while rejecting amnesty for the same. The Ruto-led ODM wing, now in solidarity with that of PNU, was in stark contrast to their earlier stand that had vociferously proclaimed: *Don’t be Vague Go to The Hague* (see Fig. 2). Raila Odinga’s ODM faction had likewise dramatically shifted its position from advocating for a general amnesty for PEV cases to supporting the prosecution of the masterminds of the violence at the ICC, possibly on the calculation that this would eliminate key electoral opponents in the 2013 elections.

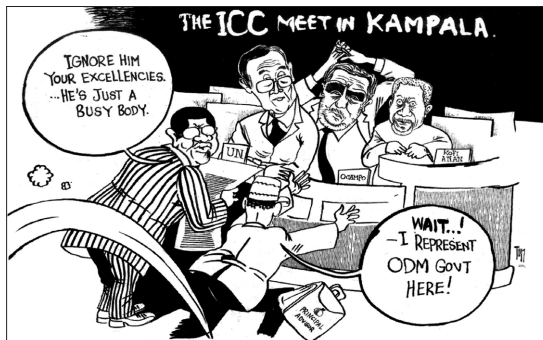


Fig. 13 Tum 05/06/10

However, PNU—from which Uhuru Kenyatta later crafted The National Alliance (TNA), and the Ruto-led ODM faction from which United Republican Party (URP) was crafted, both of which merged in December 2012 to form Jubilee Coalition—were more resolute in opposing the ICC process from 2010 onwards through single-mindedly seeking to secure political power from which position the duo would effectively parry the ICC process (Fig. 14 and 15); Mueller 2014). The duo also robustly mobilised ethnic sentiments in attempts to ward off the ICC indictment as metaphorically captured in (Fig.16) as unleashing the ethnic GEMA (Gikuyu, Embu and Meru) and KAMATUSA (Kalenjin, Maasai, Turkana and Samburu) communities on the ICC.



Fig. 14 Celeste 24/10/2012



Fig. 15 Kham 31/01/2012



Fig. 16 Kham 06/04/2012

The two groups also enjoyed the full backing of the government machinery, where saving the ICC indictees became an obsession that not only consumed the energies of the leadership and many members of the clergy who copiously offered prayers for the suspects (Fig. 17), but was also caricatured as resulting in the complete shutdown of other government operations as President Mwai Kibaki and Vice President Kalonzo Musyoka single-mindedly concentrated on saving the Ocampo six (Fig. 18, *see also* Brown & Sriram 2012). The government stance towards the ICC, in turn, had morphed from being largely cooperative in 2008 at the moment of the country’s vulnerability to hostility in 2011 (Fig. 19).



Fig. 17 Gado 13/01/2011

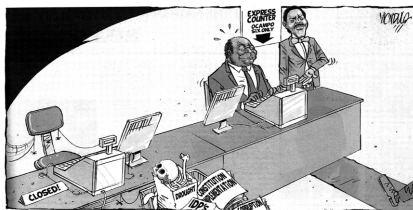


Fig. 18 Victor 09/03/2011

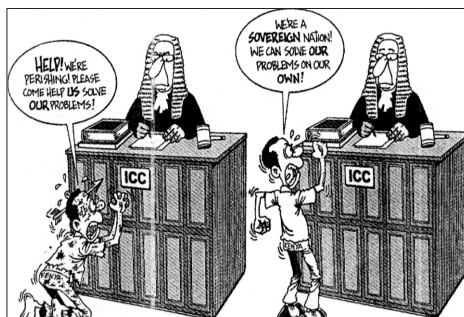


Fig. 19 Kham

The ICC on the other hand presented Raila Odinga and his section of ODM with a dilemma on whether to support or reject the ICC process (Fig. 20). Furthermore, the ODM strategists were unable to articulate a clear and principled position about the best way to deal with the PEV and ICC (Fig. 21), perhaps in recognition that two of the six accused persons, William Ruto and Henry Kosgey, had been senior members of the ODM hierarchy. Secondly, seeming to support the ICC process too strongly would have sent the signal that Raila Odinga had abandoned former key allies from the Kalenjin ethnic block. Yet not supporting the process would have suggested ODM had abandoned the common-man base, which would logically include the IDPs, with whom the party projected itself to be aligned. At other times the pressure of anti-ICC sentiment from the African Union (AU)—as aggressively petitioned by PNU—left ODM both isolated from the anti-ICC position espoused by African states as well as feeding into the perception that Mr Odinga was the candidate for the Western powers (Fig. 22).

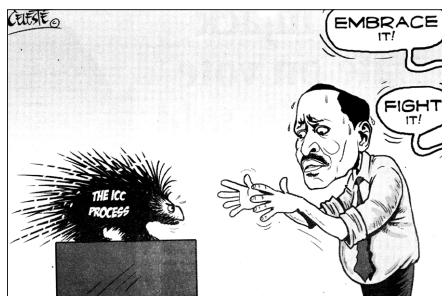


Fig. 20 Celeste 30/01/2012



Fig. 21 Ozone 02/03/2011



Fig. 22 Celeste 24/03/2011

Later in 2012, ODM would enter into the CORD coalition partnership with Kalonzo Musyoka's Wiper Democratic Movement, formerly ODM-Kenya. Kalonzo Musyoka, the Vice-President in the 2008–13 Grand Coalition, had been vigorously involved in the persistent 'shuttle diplomacy' that sought to petition the AU, UN, African Heads of State and other world leaders to defer or stop the ICC cases at The Hague. However, Kalonzo's overzealous engagement in the shuttle diplomacy was perceived as a cynical strategy based on the assumption that Uhuru Kenyatta and William Ruto would not run in the 2013 elections, and that the two would reward Kalonzo's efforts by mobilising their ethnic constituencies to support his candidacy, probably on the understanding that he would shield the two from ICC prosecution (Fig. 23). But that was not to be as, surprisingly, Uhuru Kenyatta and William Ruto successfully crafted an alliance of the accused, leaving other aspiring presidential candidates in politically embarrassing positions, most notably Eugene Wamalwa (Fig. 24) and Musalia Munda-vadi (Fig. 25). Like Kalonzo Musyoka, the two had allied themselves to the UhuRuto camp hoping that they would benefit from the endorsement of the ICC indictees, whose candidature was presumed unfeasible.



Fig. 23 Kham 02/02/2012

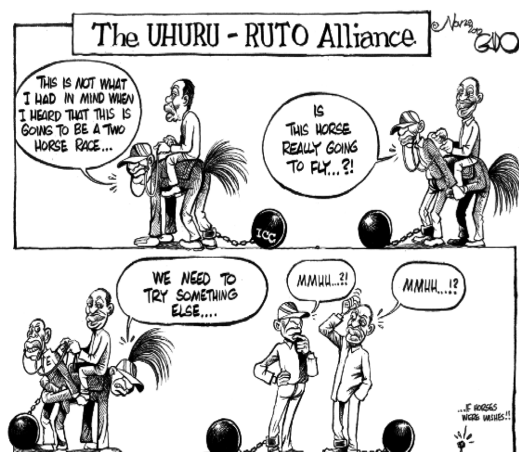


Fig. 24 Gado 28/11/2012



Fig. 25 Gado 06/12/2012

After the electoral triumph of UhuRuto and the defeat of Kalonzo Musyoka’s CORD alliance, Kalonzo was reported in May 2014 to have condemned the African Union petition to terminate ICC charges against Uhuru and Ruto, terming it retrogressive and inimical to human rights protection in Africa. Kalonzo Musyoka’s comments stood in total contradiction to the relentless shuttle diplomacy he had been involved in earlier that had fervently sought to achieve what he now condemned. Fig. 26, using the chameleon metaphor, caricatures Kalonzo’s turnaround that echoed his earlier depictions as a shamelessly opportunistic and double-faced politician variously described as ‘spineless’ (Fig. 27), and a ‘watermelon’—red in the inside but green in the outside—in reference to the 2010 Constitution referendum campaign in which he was perceived as having lukewarm support for the ‘Yes’ (green) vote while he was actually a ‘No’ (red) sympathiser.



Fig. 26 Gado 20/05/2013



Fig. 27 Victor 25/10/10

However, the shameless and opportunistic shifting of political positions as epitomised by the political class regarding the ICC process was not unique to Kalonzo Musyoka, but rather a defining feature of the political discourse in the run-up to the 2013 elections. Gado (Fig. 28) hypothetically caricatured how positions would have predictably shifted opportunistically if a different set of political elite had been named as suspects by the ICC. Those opposed to the ICC process at that point would have vociferously been demanding that their political opponents face trial at the ICC. The cartoon, therefore, graphically captures the amoral nature of Kenyan politics, in which opportunism rather than principle seem to be the defining orientation.



Fig. 28 Gado 17/03/2011

As the political elite opportunistically shifted their stances about the ICC process, they showed a callous indifference to or cynical manipulation of the plight of the victims of the 2007–2008 PEV (Figs. 17 panel 4 above, 29 and 30). They occasionally used the IDPs as fodder for political contests like in Fig. 31 enacting the blame game in 2011 between Raila and Uhuru about who between the two, as the Prime Minister and Finance Minister respectively, was to blame for not releasing government funds that had been set aside for the resettlement of IDPs who still languished in makeshift camps three years after the PEV.

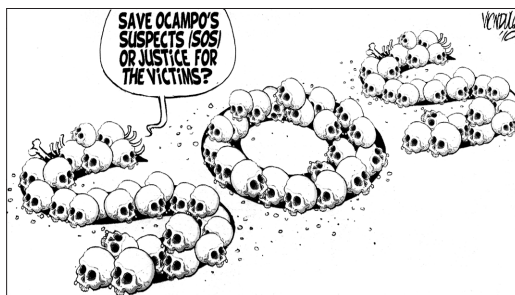


Fig. 29 Victor 21/12/2010

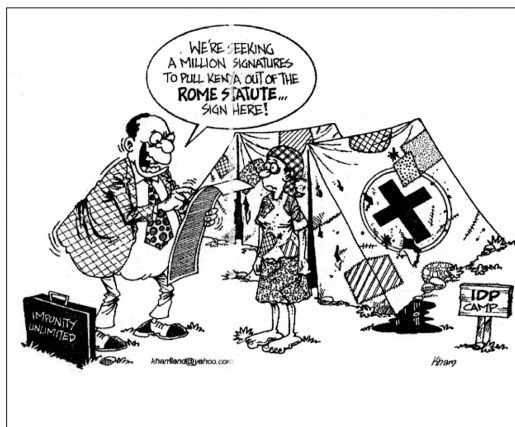


Fig. 30 Kham 01/2/2011

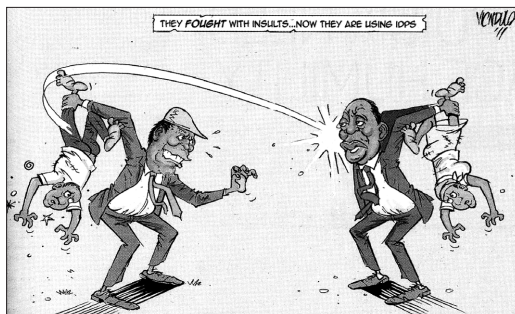


Fig. 31 Victor 16/03/2011

Conclusion

An overview of editorial cartoons has shown brazen contradictions and shifts in political positions by the political elite regarding the ICC process, opportunistic formation of political alliances, and insidious appealing to the discourses of victimhood in anticipation of securing power in the 2013 elections. This is akin to what Sandbrook (1975:20) describes as “amoral pragmatism”. Sandbrook (*ibid.*) defines amoral pragmatism as the ‘absence of a civic culture’ in which there are ‘widely accepted normative rules defining the ends and means of political action.’ Sandbrook (*ibid.*) argues that amoral pragmatism as a means to gain and bargain for power as well as accumulate economic resources had become an established orientation of the political elite activities in Kenya by the mid 1970s. Hornsby (2012:168) asserts that amoral pragmatism remains the dominant orientation in politics today.

Whereas the ICC intervention in Kenya seems to have provoked extreme anxiety among the political elite, it also provoked unabashed amoral pragmatism that largely derailed the 2013 elections from being contested on the potentially transformative platform of the implementation of the 2010 Constitution. Coupled with amoral pragmatism is its connection to ethnic mobilisation and correlating ethnic polarisation, most conspicuously in Figs. 16 and 10 respectively.

Kwamchetsi Makokha’s article (*Saturday Nation*, March 6, 2013) about a conversation he had with William Ruto a year before the 2013 elections provides an interesting glimpse to how amoral pragmatism and its linkage to ethnicity played out in the run-up to the polls. Ruto then, Makokha reports, made the observation that the 2013 presidential elections would be won by a confounding alliance between the Kalenjin and Kikuyu, based on a conclusion he had reached that “politics works on coalitions of hatred” (*ibid.*). Coalitions of hatred are primarily constructed around ethnic identities and the attendant real and imagined perceptions of betrayal, victimhood, marginalization, skewed opportunities, and historical injustices. Kabiri (2014:519) terms these modern ethnic identities as a form of ‘false consciousness’ and ‘induced’. Furthermore, Simatei (2010) has shown the Kalenjin ethno-nationalism in Kenya as having fuzzy and elastic boundaries, beset by contradictions and ambivalences. In 2007 elections, the coalition of hatred was construed as 41 versus 1: the forty-one ethnic communities in Kenya versus the Kikuyu.

Going by this logic, in the 2013 elections, the coalition of hatred that seemed to have worked best revolved around two objects cleverly linked together: Raila Odinga (see Fig. 10) and the West via the ICC engagement in Kenya. Concomitantly, UhuRuto projected themselves as defenders of Kenya’s sovereignty. Raila Odinga’s and ODM ambivalence towards the ICC (Figs. 21–23) and the persistence of the Jubilee coalition (Figs. 14–15)—helped a great deal by the government machinery (Figs. 17–19), sophisticated mobilisation skills, and the ill-advised warnings by Western diplomats for Kenyans not to elect the ICC duo (UhuRuto)—made it easy for the revival of discourses of Western imperialism and its linkage to Africa’s distressing experiences with colonialism. These factors combined to contribute to Jubilee’s victory.

The power of the political elite’s opportunistic appeal to discourses of betrayal and victimhood that propped up coalitions of hatred in electoral politics as witnessed in 2007 and 2013 elections is likely to have adverse effects in future electoral processes. It is likely that the political elite would continue to find it appealing to perpetuate and magnify such discourses as an easy means of gaining state power. Since such coalitions are largely opportunistic and superficial, it is unlikely that genuine grievances that make such victimhood discourses resonate with the public would be sufficiently addressed by the coalitions so formed. Furthermore, whereas the elite might find it easy and expedient to weave in and out of the coalitions of hatred, this strategy is likely to compound ethnically induced grievances and heighten the sense of exclusion among the public thus creating a vicious cycle of hatred that eats away at the cohesiveness of the Kenyan society. It also seems the case that the national leadership that are likely to be elected in Kenya are those that have the greatest capability of mobilising and crafting ethnic coalitions. Finally, if electoral politics in Kenya continue being moulded on the principle of elite amoral pragmatism as most clearly epitomised by coalitions of hatred, the intention of the ICC process to bring an end to impunity and infuse politics of accountability in Kenya will have been lost, and as Gado graphically illustrates below (Fig. 32), a sequel to the 2008 PEV in future is likely.

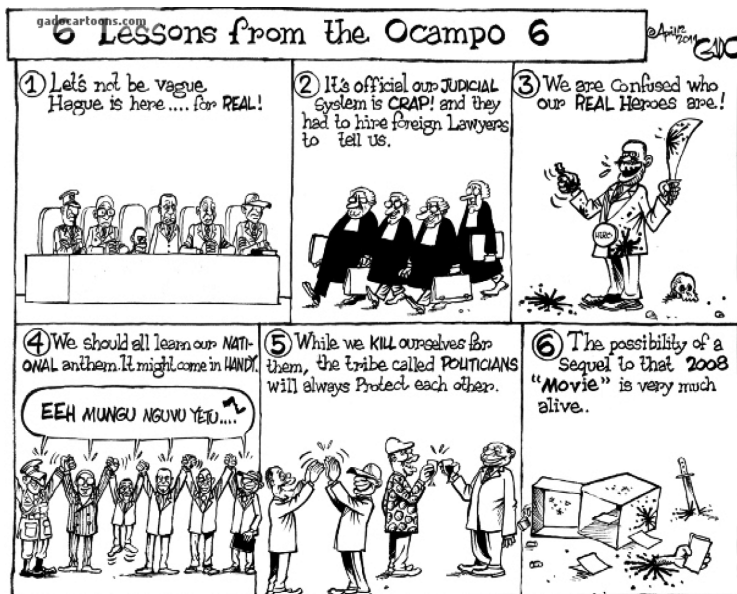


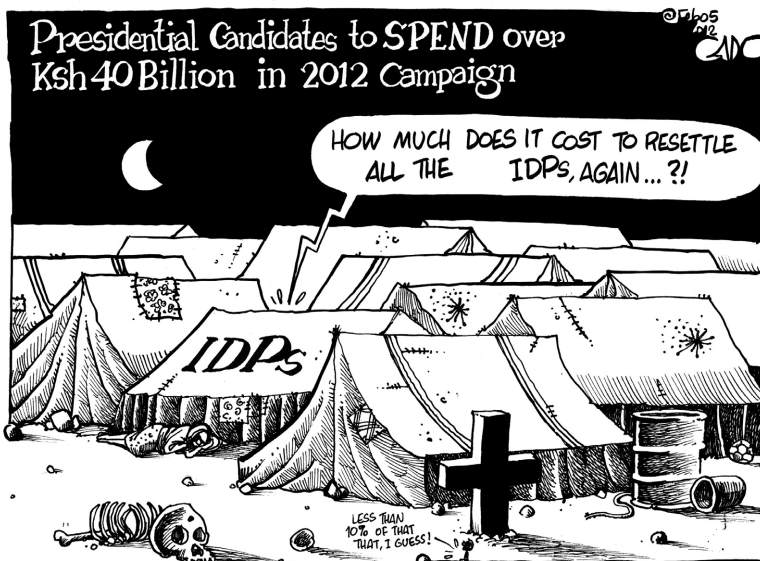
Fig. 32 Gado 12/4/2011

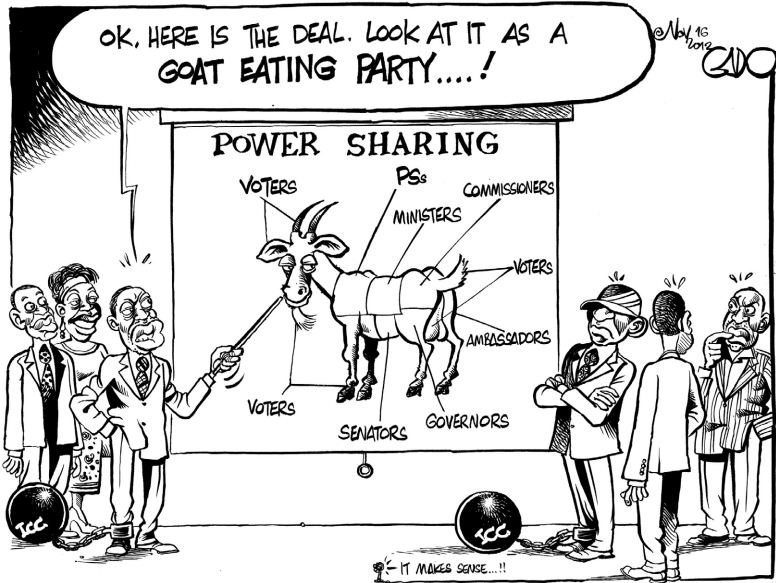
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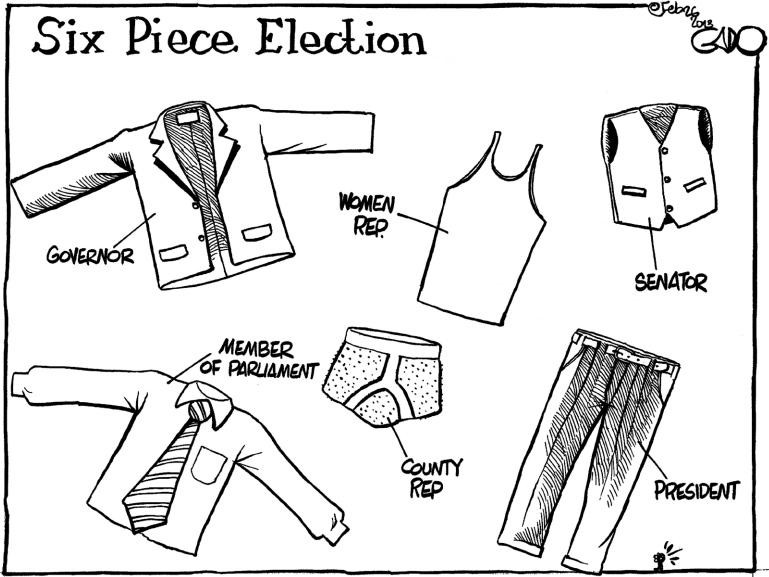
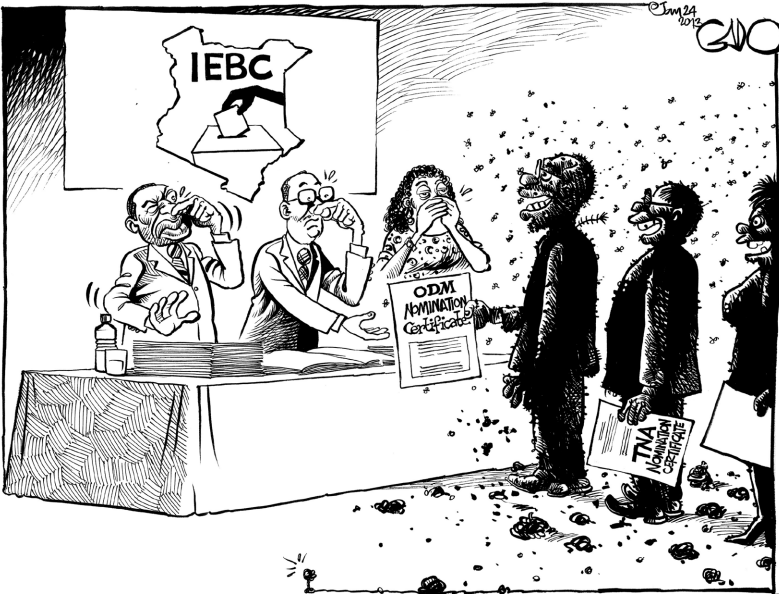
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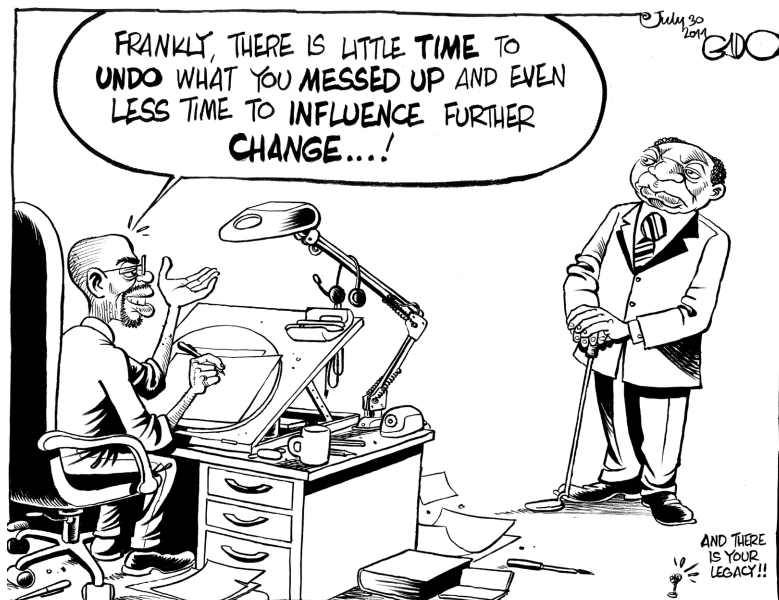
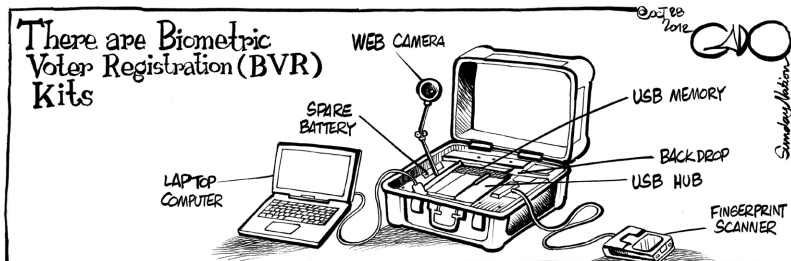
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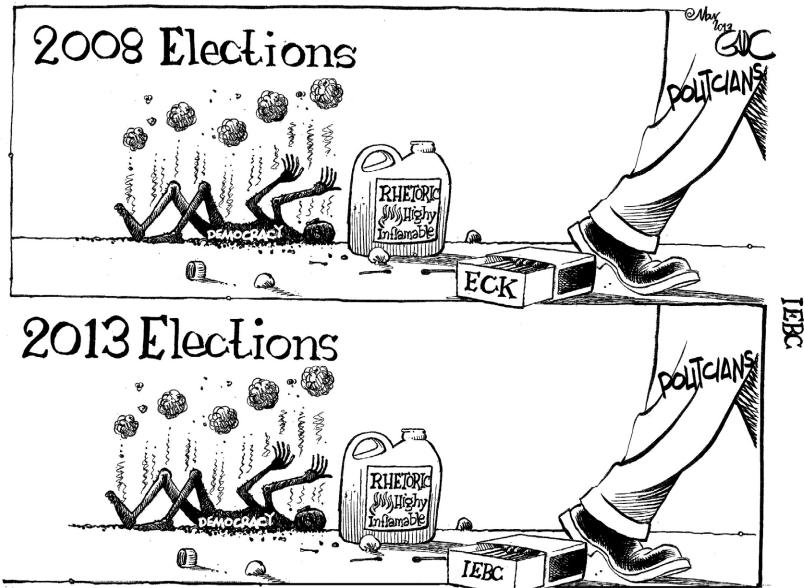


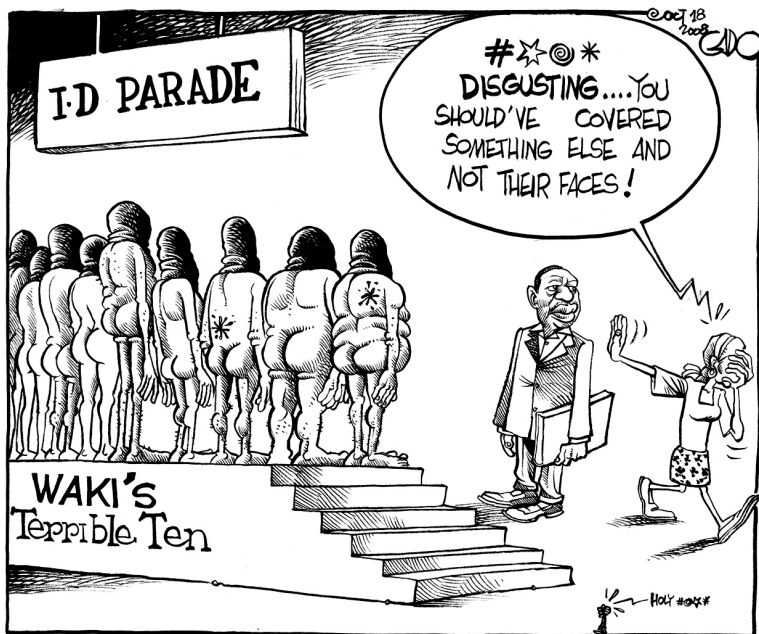




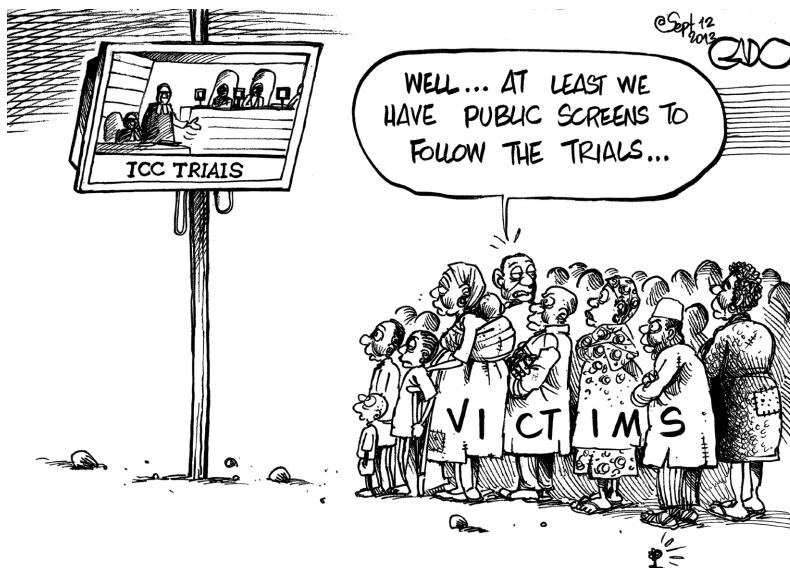


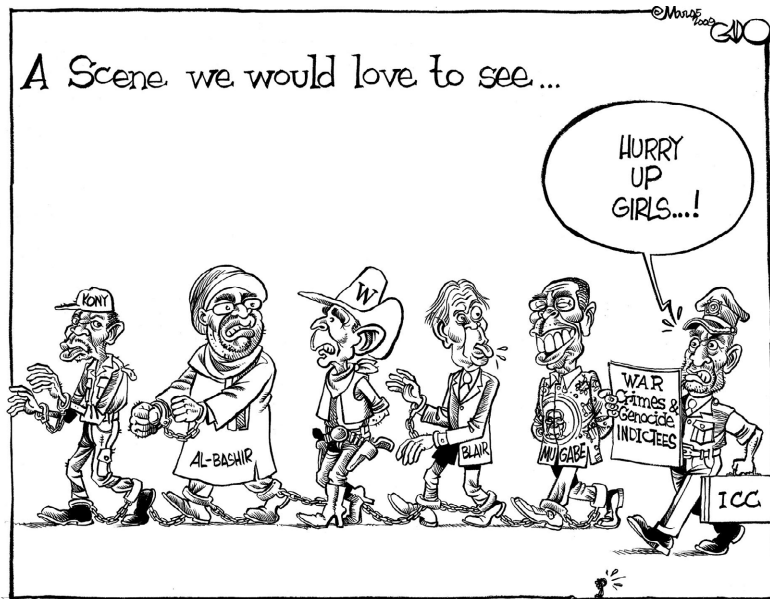


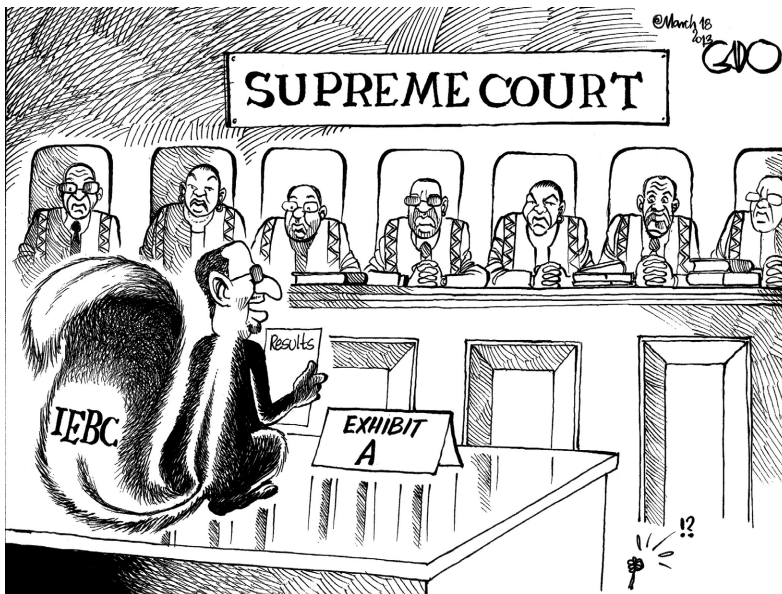
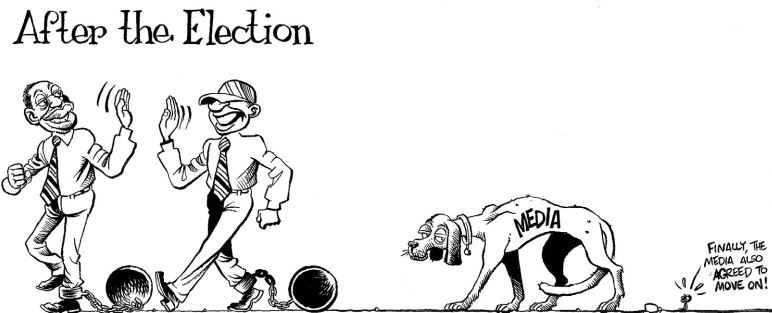












Amicus Curiae (Plural: *Amici Curiae*)
FRIENDS OF THE COURT

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Amicus Corruptiae (Plural: *Amici Corruptiae*)
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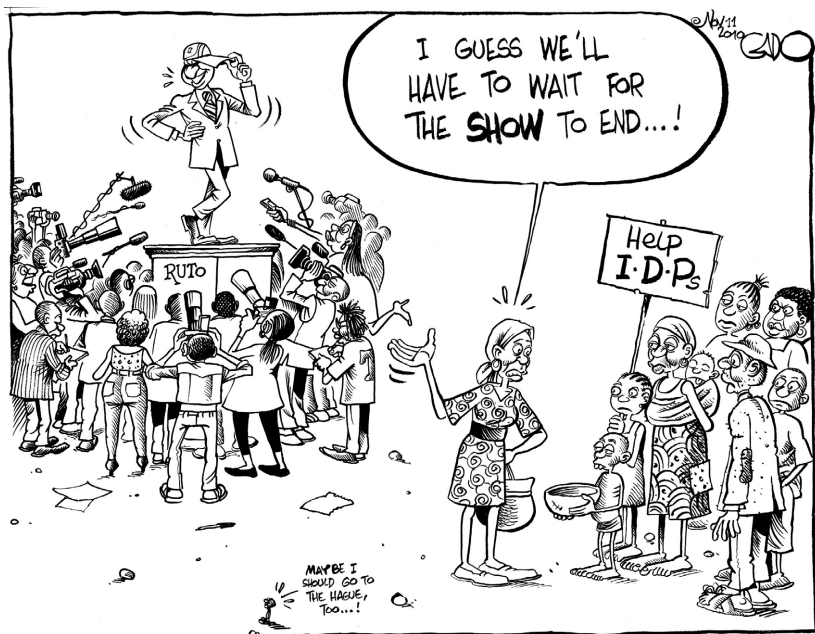


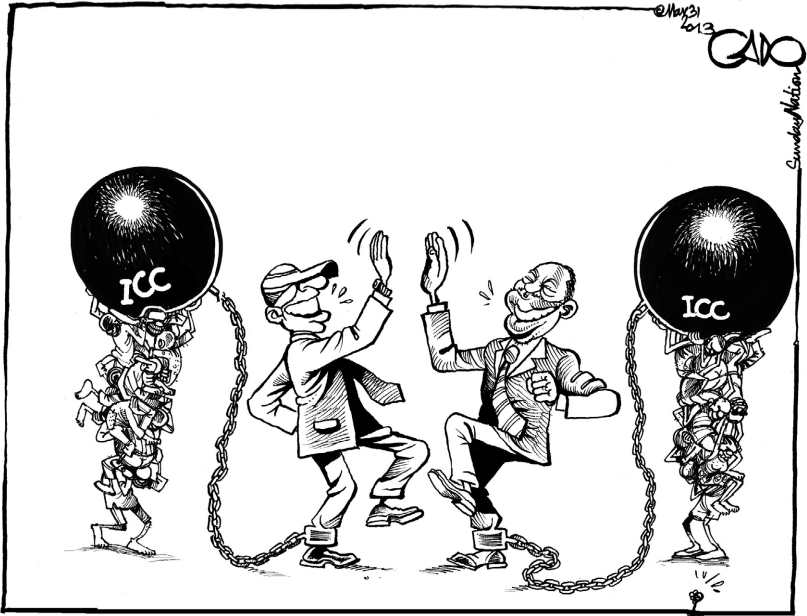
Scenes from Kenya's social media

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WITH INSPIRATION FROM MACHARIA GATHUJI







Poster with Uhuru and Ruto.



Security agents guard
the National Tallying Centre.



Security agents guard
the Tallying Centre.



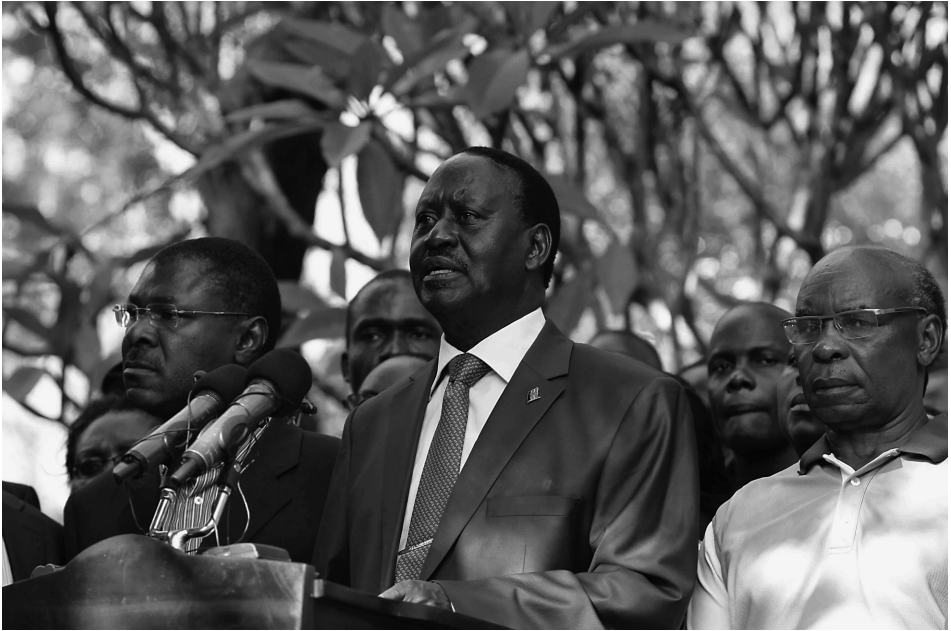
Security agents leave the
National Election Centre.



TNA supporters wait anxiously.



A pensive Raila Odinga
and his supporters.



Raila addresses Kenyans.



Uhuru Kenyatta (Front Right), William Ruto (front Left) express happiness after being declared winners.

Part II

Sources of the Mandate to Lead

IEBC and Kenya's 2013 Elections: Reform, Conform or Temporary Ceasefire?

PETER WAFULA WEKESA

Introduction

The 2013 elections were the tenth general elections since Kenya attained independence in 1963 and the fifth since the restoration of multiparty democracy in 1991. Like the previous elections, the aftermath of the 2013 elections has raised important debates on whether periodic elections are in themselves a guarantee to sustainable peace and democracy or not. The one critical institution at the centre of these debates has been the Independent Electoral and Boundaries Commission (IEBC). As a body charged with the responsibility of organizing and managing the 2013 elections, IEBC was at the centre of the constitutional, legal and administrative issues surrounding the election and the future of the electoral system in the country. When on March 9, 2013 the IEBC declared Jubilee's Uhuru Kenyatta as president elect with 50.07 per cent of the vote, barely passing the threshold for a first round victory, questions begun to emerge not only about the credibility of the results but also on the impartiality of IEBC in the conduct of these elections. These questions became more manifest when Kenyatta's closest opponent, former Prime Minister Raila Odinga challenged his victory in the Supreme Court.

The Supreme Court process revealed important issues regarding the IEBC especially in regard to a number of irregularities and technical failures during the elections. These notwithstanding, the Supreme Court validated the elections thus appearing to offer a lifeline to the IEBC. Although Odinga, his party and several civil society organisations accepted the ruling, the post-2013 election

period has continued to be marked by robust debates and revelations on the IEBC's failures during the 2013 elections with some touching on the credibility of top officials of the electoral body. Some of these issues have been subject to ongoing court cases. These sustained debates and revelations seem to be casting doubts on the electoral body's ability to manage future elections, and thus emboldening discussions on the need for its reform or disbandment all together. The more loudly these voices have grown, the more urgent the need to reform IEBC in order to restore its confidence in the electoral process. Questions are continuing to be asked not only about the IEBC and the 2013 elections but also on the ways of making the institution a non-political and impartial player in the conduct of future elections.

This chapter sets out to interrogate the ways in which the IEBC discharged its mandate during the 2013 elections from the hindsight of the reform initiatives undertaken before the elections and the mounting debates towards its disbandment after the elections. The key question raised in the chapter is whether the IEBC, through the reforms undertaken before the elections stood the test of time as an impartial institution or conformed to the diverse polarised interests manifest in Kenya's pluralistic society. The chapter examines these issues in the light of the post-2013 election push for the disbandment of IEBC and the present tenuous peace being experienced in the country. Whether the IEBC's role during the election simply gave rise to a temporary ceasefire or not, and what all this means for the politics of electoral reform and for the future of elections and democracy in Kenya, are important analytical concerns.

To disband IEBC or not: The debates

On June 5, 2014 the Kenyan media carried reports indicating that the Speaker of the National Assembly, Justin Muturi, had confirmed to Parliament receipt of a petition seeking the removal of the Independent Electoral and Boundaries Commission (IEBC) Chairman, Ahmed Issack Hassan and eight commissioners from office. The petition signed by Robert Wafula Buke sought the disbandment of the IEBC, saying its officers engaged in serious violation of the Constitution and showed gross misconduct in performing their functions and duties as constitutional officers during the March 2013 elections. The petition, therefore, asked the House to resolve and disclose grounds for the removal of IEBC commissioners and to recommend to President Uhuru Kenyatta to appoint a tribunal to investigate the commissioners as required by the Constitution. As

with all petitions to the National Assembly, this had to be committed to the departmental committee on Justice and Legal Affairs for consideration within a period of 14 days to determine whether it satisfied the grounds for the removal of the IEBC officials as provided for in Chapter 251, Articles 1 and 2 of the Kenya Constitution. The IEBC officials appeared before the committee and on July 17, 2014, Buke's petition was dismissed for lack of merit and for failing the test of constitutional requirements.

It must be recalled that the IEBC is a creation of the 2010 Constitution. Following the promulgation of the Constitution, the IEBC Act was passed in 2011 and paved way for the appointment of the current commissioners, chaired by Issack Hassan, and eight others, who are to serve a six-year one-term on a full-time basis. Their appointment followed a fairly rigorous process that included an open application process and a vetting process that was publicly broadcast on the media. With this in mind, it begs the question why then there seems to be a sustained push for the disbandment of the IEBC and the calls for the sacking of the commissioners before their constitutional termends.

It needs to be noted that the push for the disbandment of the IEBC has not been one individual's initiative, but is indeed a culmination of a long drawn process that goes back to the 2013 Elections. This push has mainly been sustained by the opposition Coalition for Reforms and Democracy (CORD) and although both Wafula Buke and CORD have maintained that their causes are different, the objectives as well as the timings are intertwined. Indeed Buke's petition was being made at the time when CORD was mounting pressure on the Jubilee government to hold a national dialogue in early July 2014 to discuss the many challenges that faced the country. It is notable that among the key issues on the CORD agenda was the disbandment of the IEBC. Although the CORD ultimatum to the Jubilee government for a national dialogue in early July 2014 and the Saba Saba (7/7 in Kiswahili) rally came and passed, the discourses around the IEBC still remain enmeshed within Kenya's general political narratives.

Central to the push for the dissolution of IEBC are two interesting arguments both of which have generated a wide rift between the ruling Jubilee Coalition and the opposition CORD. On its part, CORD maintains that the March 2013 elections were rigged by IEBC in favour of Jubilee and, therefore, the institution has no legal and moral right to continue existing in its present form leave alone the possibility that it could again be entrusted with the running of another election in future, especially the one coming up in 2017. The latter possibility, indeed,

seems real given that the constitutional term of the current commissioners is six years, meaning that it would end after the 2017 elections. IEBC, according to CORD, was an impartial body that lost the trust and confidence of the majority of Kenyans during and after the 2013 elections and merely hid behind the façade of having been legally established and its commissioners being competently hired and vetted by Parliament.

The Jubilee Coalition on the other hand maintains that there cannot be any dialogue with CORD on issues touching on the IEBC or any other matters touching on the law (*The Star*, 20 April 2014). In their view, the 2010 Constitution created independent institutions that have a role in dealing with national issues and therefore any national dialogue needs to be framed within these institutions. They argue that the roadmap for the IEBC disbandment is clearly outlined in the Constitution and thus need to be followed by CORD. Indeed as the National Assembly Majority Leader, Aden Duale emphasised: “We cannot disband institutions each time people lose elections. Like Manchester United you do not fire players when the team is under-performing you fire the coach. In this regard CORD needs to fire its coaches Raila Odinga, Moses Wetangula and Kalonzo Musyoka” (*DNA*, 6 June, 2014).

But why is the IEBC on trial? Why is it generating a lot of debates among the political class? It must be recalled that the IEBC, which was in charge of the March 2013 elections has been under close scrutiny ever since it declared Kenyatta President-elect with a 50.07 per cent of the vote barely passing the threshold for a first round victory. His closest challenger, Odinga challenged the victory in court and despite allegations of irregularities and technical failures, the Supreme Court validated the election. Although Odinga and his party accepted the ruling, his party and several civil society organizations still question the election’s shortcomings and its impact on democracy. It is indeed within this context that one can appreciate the current debates around the IEBC. On the one hand IEBC is essentially at the centre of Jubilee’s ascension to power and thus its disbandment would certainly cast aspersions not only on the validity of the 2013 elections but, indeed also the Jubilee victory and stay in power. On the other hand, its disbandment would open up to the opposition CORD’s narrative that the 2013 elections, just like the 2007 elections, were “stolen” by the electoral body in favour of Kenyatta and Mwai Kibaki respectively. At the centre of all these discussions is the role and future of the IEBC as the statutory body charged with organizing and managing the country’s elections.

IEBC, reform and the shadow of the 2007 elections

To appreciate the context of the current discourses around the role of the IEBC during the 2013 elections and perhaps attempt to chart the institution's future in terms of election management, there is need to pay attention to its historical background in terms of the electoral reform agenda that followed the disputed 2007 elections that generated one of the worst unprecedented post-election violence in the country's history. It would be accurate to argue that IEBC's umbilical cord is traced to the 2007 elections and its aftermath. While the previous elections, especially those of 1992, 1997 and 2002 were marred by violence, the magnitude and intensity of the 2007 elections was unmatched. The 2007/2008 Post-Election violence (PEV) was the most destructive and deadly given that within weeks after the announcement of Mwai Kibaki as the winner and his swearing in at State House, 1,133 people lost their lives to the violence that also led to the displacement of over 300,000 others from their homes (CIPEV, 2008).

The international mediation process that brought an end to the violence pointed out the need to comprehensively review the country's electoral system given that the failure of the Electoral Commission of Kenya (ECK) had been noted as the main trigger that sparked off the violence. There was, therefore, as part of the mediation and reform framework, the pertinent need to re-evaluate the legal framework for elections to ensure that there was genuine and fair political competition in future. Undoubtedly, it had become apparent that flawed elections only threatened the stability of the country and, therefore, every effort needed to be made to ensure that elections were free and fair in order to restore the confidence of the citizens in the political system. In a way therefore, as Mwagiru (2011:9–22) observes, it was the electoral conflict of 2007/2008 that gave urgency to the calls for electoral reform in Kenya. Its aim was, to among other things, change the attitudes and perceptions of citizens and other stakeholders about elections and electoral reform.

On 28th February 2008 when the National Accord was signed, the reform of the electoral process was at the centre of the discussions. The cycle of violence that had characterized previous elections as well as the disastrous effects of the 2007/2008 PEV had to be brought to an end. It must be emphasised, however, that the PEV was not just about elections. According to Lumumba (2011:154–155), it had also more to do with how the contestants viewed the State, as economic largesse to be appropriated by the winner in a high stakes, zero-sum

political game. The objectives of the contestants were often primitive accumulation by an ethnic conspiracy, which was constructed as a means of winning or retaining power. To stem this trend, therefore, the National Accord mandated the Coalition Government to undertake key electoral reforms whose objective was not just to end violence, but also address two fundamental concerns identified by Chege (2001:4–10) as the desire by Kenyans for a more perfect democracy and the resolution of deep seated ethnic claims and grievances.

It is within the foregoing initiatives that the Coalition Government formed the Independent Review Commission (IREC), a non-judicial body that was mandated to investigate all aspects of the 2007 elections and make recommendations to improve the electoral process. Chaired by retired South African judge, Johann Kriegler, IREC completed its work and submitted a report of its findings to the coalition government in October 2008. In its conclusion, IREC or the Kriegler report as is popularly known observed that

“Kenya’s constitutional and legal framework for elections contained a number of weaknesses and inconsistencies that undermined its effectiveness. The ECK was accused of incompetence, laxity and dereliction of duty in the conduct of the presidential poll. The manner of appointment of commissioners and the structure, composition and management system of the ECK was materially defective, resulting in such a serious loss of independence, capacity and functional efficiency as to warrant replacing or at least radically transforming it” (IREC, 2008:21–22).

As far as the integrity of the results was concerned, the Kriegler report observed:

“The conduct of the 2007 elections was so materially defective that it is impossible for IREC or anyone else to establish true or reliable results for the presidential and parliamentary elections” (IREC, 2008:21–22)

It is noteworthy that the recommendations from the Kriegler report formed the basis for the electoral reform that ultimately gave birth to IEBC. Among the developments within this framework, included the passing in Parliament in December 2008 of the Constitution of Kenya (Amendment) Bill which effectively disbanded the ECK and set the pace for the establishment of the Interim Independent Electoral Commission (IIEC), whose main purpose was to reform the electoral process and manage elections in order to institutionalize free and fair elections. Its members were later nominated by the Parliamentary Select Committee on Administration of Justice, approved by Parliament, and then

appointed by the President in consultation with the Prime Minister. The Interim Independent Boundaries Review Commission was also created to take over the defunct ECK's functions in delimitation of boundaries, and to review electoral boundaries through a scientific criteria.

The disbandment of the ECK and the establishment of IEBC became one of the most significant drivers in the reform process whose influence came to bear on the 2013 elections. As with the inefficiencies identified by the IREC report in the performance of the ECK, it was hoped that IEBC would usher in a new era of not only free and fair elections, but also one that would reestablish the trust of the citizens within the electoral systems. In any case, any effective and electoral system should as Chege (2007:4–10) observes be able to define the manner in which the wishes of the voters are translated in the legislature and decision making in government. This was even more critical in Kenya where the communities are culturally segmented and where group interests are highly polarized along ethnic lines. Because of these, the rules behind balloting, computation of winning candidates, party representation in the legislature ought to be inclusive of all groups and interests as possible.

The debate on inclusiveness and exclusiveness within the political process has been central in the country's electoral process and is one that the transformation from ECK to IEBC alone would not address. As Wanyande (2006) noted, Kenya's political culture is extremely ethnic-based and electoral contests become ethnic contests whereby the winners engage in primitive accumulation at the expense of the losing communities, which are often excluded from governance. The winner-takes-it-all electoral and governance design was, indeed, noted to have been at the centre of the 2007/2008 PEV (IREC, Report; Mutahi 2011). This political history seems to have created a major ethnic divide in Kenya whose unsavory results needed to be addressed through two major reforms besides the electoral reforms. It is within this regard that the Commission of Inquiry into Post-Election Violence chaired by Justice Phillip Waki and the new Constitution were conceived as instruments that would address long term issues affecting the country.

The eventual promulgation of the new Constitution in 2010 was perceived as a positive process towards anchoring and addressing long term issues that created divisions among the people, including poverty, inequality, regional imbalances and unemployment. The 2010 Constitution ushered in significant changes, including the provision of a new and expanded Bill of Rights with a

guarantee on citizen's socio-economic rights. Quite significantly, it clipped presidential powers, provided for more equitable distribution of national resources, created 10 constitutional commissions to speed and oversee reforms, and introduced a bicameral legislature and devolved many government functions to 47 county governments. Though emotive, the commencement of the Kenyan post-election cases at the International Criminal Court (ICC) at The Hague equally sought to restore hope among the PEV victims that at last justice will be achieved through the process. Whether these reforms have succeeded in addressing some of the major issues affecting the country, especially the strong ethnic dimension, polarisation and divisions as reflected during elections, remains to be seen. Political coalitions and parties still remain largely ethnic enclaves built around ethnic political barons, with a few ideological differences. All these had important implications on the performance of the IEBC in 2013.

IEBC, 2013 elections and the fallacy of the peace narrative

One of the most intriguing manifestations of the 2013 elections was the shadow of the 2007 elections, especially the post-election violence. The manner in which this was played out and the role of the IEBC have provided an interesting peace narrative in the country's political history. From the outset we need to mention, and indeed question, the narrative that the 2013 elections were the most peaceful in the country since the reintroduction of multiparty politics in 1992 (International Crisis Group (ICG) 2013:3–5). In a Policy Briefing by the International Crisis Group No 94 published in May 2013, the various ways through which the narrative on the tenuous peace was constructed included the multiple prayer rallies held by some presidential candidates, widespread peace campaigns by youth groups, media, international pressure groups, civil society groups, church leaders and ordinary citizens. All these initiatives were being mounted in the shadow of the 2007 election especially to avoid a repeat of the 2007/2008 PEV. The fear that the violent electoral history could repeat itself in 2013 drove most of these initiatives.

Looking at the various developments taking place in the country today especially the discourse around the reform process and the sustained push for the dissolution of the IEBC, one gets the impression that the peace narrative as sustained before and after the 2013 election was but a mere refraction from the pertinent issues affecting Kenyans. In real terms, this could be regarded as a form of perverted discourse that could clearly and surely suppress frank discus-

sions on the Kenyan nation-State, its challenges and how to address them. Could the country be enjoying what Gona (2013:219–221) aptly referred to as negative peace? Never mind that during the run up to the 2013 elections, politicians were ordered to refrain from discussing emotive issues of land and inequality on the campaign trail and the media altered its rhetoric and self-censored its coverage, for instance abstaining from broadcasting pre-and post-election demonstrations and protests (ICG 2013:3–5).

Again, the construction of the peace narrative prior to the election was not oblivious of the hyped tensions and security concerns in various parts of the country. Pre-election violence in the form of inter-ethnic resource-based conflicts that led to displacement of several people was reported in parts of coastal and northern Kenya. Since August 2012, for instance, Tana River County was at the centre of this violence that led to at least 180 deaths in the fighting between the agriculturalist Pokomo and the pastoralist Orma communities. An estimated 34,000 people were displaced in conflicts that were linked to struggles for political power and in particular, competition to gain control of the devolved system of government. There also remained fears of possible terrorist attacks, as a result of Kenya's pursuit of al-Shabaab militia in southern Somalia. In the greater Rift Valley, Western Kenya and Nyanza areas which had been the bedrock of the 2007/2008 PEV, the situation could be described as restive with no one being sure of what the outcome of the election would portend. What all these meant was that like with the previous elections, security concerns before elections, though glossed over and conflated within the peace narrative, were real.

Of particular relevance to the context of this contribution is the way in which the IEBC discharged its mandate during the 2013 elections and the silence and tensions that were conjured within the tenuous peace narrative. How exactly did the IEBC fare during the 2013 elections? This is a question that would certainly evoke diverse responses from the citizens across the political and ethnic divide. Although the desire to avoid the replay of the 2007/2008 PEV was understandable, this need not have absolved IEBC from effectively discharging its constitutional mandate of conducting a free and fair election. Indeed the 2007/2008 PEV should have given IEBC the impetus and an opportunity to organize an orderly and democratic election guided by massive civic education. This assertion is complemented by the fact that the reform agenda initiated within the framework of the new constitution, especially in regard to electoral

reform had overly succeeded in injecting some level of confidence in various electoral institutions including the IEBC. The trust and high level confidence in IEBC emanated from the fact that its establishment, unlike the earlier ECK, was popularly and competitively sanctioned by all the political parties. On the other hand, the IEBC commissioners had been competitively hired and vetted by Parliament. In both cases, therefore, IEBC seemed to have had the legal and popular backing from the majority of Kenyans.

The confidence within public institutions could not be restricted to the IEBC but to the entire constitutional framework which had rekindled public trust after the promulgation of the new Constitution. As a consequence, new laws and institutional arrangements that demanded transparency and accountability, as well as the new oversight mechanisms, signified a renaissance of sorts in public confidence. Of immediate relevance to the elections was the Judiciary, which together with the IEBC, was rated highly by the public ahead of the elections (COG 2013:8–10). Its bold rulings and administrative and technical changes had demonstrated that it could be trusted as an arbiter in the likely event that an election dispute arose. More specifically, and crucially, was that for a long time in the country's history, the IEBC was seen to be independent enough to competently run the 2013 elections.

The independence and credibility of IEBC was indeed emphasized during the preparation stage by its chairman, Ahmed Issack Hassan, who on a number of occasions, noted that the effectiveness of the electoral system had been checked through the simulation exercises held in each of the counties (CGA 5–10). He also emphasized that the recruitment and training of staff, acquiring and testing of sophisticated technology, the registration of more than 14 million voters and the delimitation of boundaries had been effectively completed. This certainly was the reassurance that Kenyans required at this time before they went to the elections. This was also necessary given that as the Commonwealth Observer Group (COG 2013:8–10) later observed, there were concerns ahead of the elections that the IEBC had been inconsistent with deadlines and that the requisite managerial capacity of the IEBC to conduct elections was yet to be properly tested.

It is significant to highlight that any iota of inconsistency in the preparation phase by the IEBC, given the past experience with the defunct ECK and the raft of reforms already initiated, would have had dire consequences on the elections and the democratic process in the future. This was more so because unlike the

previous elections, the IEBC, in 2013, was confronted by a massive election with the highest ever registered number of voters. Also, this was the first election under a new Constitution and expectations were high following the new raft of legislative measures that were put in place. The 2013 election was also complex in that it signaled multiple transitions: the end of the Grand Coalition Government, the ushering in of the new government to carry forward the implementation of the new constitution, including the creation of new governance structures, layers and levels of representation and institutions (COG 7–8). In addition to voting for the President and an expanded National Assembly, Kenyans were to vote for the new elective positions of women members of the Assembly, senators, county governors and members of the county assemblies (*ibid.*).

Clearly, while the IEBC could be credited for managing the preparation process towards the 2013 elections with a level of transparency, a number of challenges exposed it to some of the grueling inconsistencies that could have likely compromised its independence. For one, it was a virtually new body working within a new legal framework. It had to prepare for six elections as well as conduct nationwide constituency boundary delimitation and the national biometric voter registration. Although most of these functions were accomplished on schedule, delays in its internal decision-making as well as problems related to the voter registration process, late amendments of laws, among others, contributed to the late launching of voter education campaign. The latter seem to have contributed to the uneven distribution of voters vis-a-vis the population representation in key areas of the country, a fact that could have partly contributed to the phenomenon that the political scientist Mutahi Ngunyi referred to as the “tyranny of numbers”. All these came to bear on the outcome of the elections.

The IEBC, actual election and the Supreme Court ruling

The clearest way of ascertaining the success or failure of IEBC in the 2013 elections could be ably captured in the events that characterised the actual elections and the resultant Supreme Court petitions by CORD and the African Centre for Open Governance (AfriCOG). Although the actual voting was not without the usual hitches, some of which could touch on the entire failures in the electoral system, it soon became manifest that the reassurances by the IEBC chairman on the smooth preparation were mere ventures in confidence-building. A successful electoral process according to IREC (2008:11–16) was expected to meet a series

of standards: conducive environment for a successful and democratic electoral process; manage elections competently and inspire public confidence in the electoral process; settle electoral disputes efficiently and effectively. Although all indications seemed to point to the fact that IEBC was prepared in terms of legislation and structures, during the elections, the strict timeliness and the lack of structured voter education came to pose serious challenges to the institution. Specific concerns were raised about delays in the delivery of ballot materials to certain centres, which in turn, impacted on other aspects, including voter education and scrutiny of registers. In one of the key articles carried in the *Business Daily* (6 March 2013), several election monitors raised concern over the fact that voters were inadequately trained over the intricacies and magnitude of the election and this was obviously bound to reveal itself in the unprecedented number of rejected votes. This was also complicated by the fact that some of the IEBC officials were inadequately trained as well (*Business Daily*, 7 March 2013).

A report by the Commonwealth Observer Group (2013:1–44) specifically faulted the irrefutable failures of the electoral system and argued that this failure led to insufficient voter education and thus accounted for the unprecedented large number of rejected votes. Other IEBC failures observed included the inadequate training of its officials, lack of cellular network coverage at some polling stations believed to have led to the breakdown in the Electronic Vote Transmission (EVT) of results, all of which obviously challenged the credibility of the results (*ibid.*). The greatest reflection of the failure was in the IEBC initial pledges that the 2013 elections would be run on a smooth and technologically sleek platform. The promise that results would be electronically transmitted from polling stations to the national and tallying centres to allow for easy comparison was shattered by the failure of the electronic devices. Because of this, the commission was forced to revert to the manual tallying system that many believed failed in 2007. This heightened anxieties significantly, over the intent to rig the elections and impartiality of IEBC officials (*ibid.*). There were also reported instances of electoral irregularities involving IEBC staff and others related to electoral malpractices including missing names in registers, as well as voter bribery and intimidation (*ibid.*). To cap it all, serious issues were raised about the internal rifts within the IEBC ranks pitting the chairman Hassan and the Chief Executive Officer James Oswago over administrative and tendering procedures (*Daily Nation*, 30 October 2013).

The litany of electoral failures and accusations attributed to IEBC cannot be restricted to the observations by the various observer groups, but were also clearly brought into focus by the CORD-AfriCOG case that was filed to challenge the Kenyatta-Ruto victory. These petitioners requested that the Supreme Court calls for a fresh election citing evidence that the polls were neither credible nor free and fair. The petition specifically poked holes in the IEBC and the entire electoral process that led to the Kenyatta victory. However, all these notwithstanding, on 30th March 2013, the Supreme Court dismissed the CORD-AfriCOG petition and unanimously ruled that the elections were held in compliance with the law and that Uhuru and Ruto were validly elected. The court ruled that the evidence presented by the petitioners was insufficient to nullify the election results. Though Odinga disagreed with the Supreme Court ruling, he nonetheless accepted the decision and the commitment to peace. The decision was followed by riots from CORD supporters in Nyanza and Nairobi while Kenyatta's supporters hailed the ruling of the court.

The Supreme Court ruling gave way to important discussions about the judicial and political implications of the 2013 electoral exercise, especially in regard to the future of the reform agenda and the perceived court's overriding concern with maintaining the *status quo*. Specifically in terms of the role of the IEBC, pertinent issues raised against it by the petitioners in regard to procurement were to be investigated and those found culpable be prosecuted. It is within this context that in October 2013, the IEBC's chief executive and other senior officials were charged for abuse of office and failure to comply with procurement rules (*Daily Nation*, 30 October 2013). Although this appeared an isolated event, it lent credence to the CORD narrative that corruption and administrative inefficiencies cost them victory and thus warrants the commissioners to be sent packing and the commission disbanded.

The Supreme Court ruling has continued to create room for more nuanced discussions about the IEBC's role in the 2013 elections and prospects for its future impartial handling of elections. Critical questions are being raised about the possible ways through which the institution could effectively deliver on its mandate. Did the important past electoral reform initiatives especially those anticipated within Agenda Four of the National Accord mean much? Can inclusivity and impartiality transform the institution into a non-political entity during the conduct of future elections? How about the glaring irregularities and

scandals already revealed surrounding the IEBC? It is noteworthy for instance that after the Supreme Court decision was made several petitions were filed by aspirants running for the other positions, majority of them challenging the IEBC results due to what they claim were “massive irregularities” (*Daily Nation*, 11 April 2013). Most of the rulings have vindicated the petitioners and called for a recount of votes or ordered a repeat of the election in the respective areas. Despite this, the fractured and polarised nature of Kenyan politics, pitting Jubilee and CORD, have prevented any sober reflections on the IEBC with a view of improving it for the future. The country is still deeply divided and the drivers that fueled the violence in 2007, including unemployment, incomplete settlement of IDPs, security, land grievances, corruption, nepotism, impunity and ethnicity still abound. All these issues have important implications on the entire electoral process and specifically on the role of the IEBC.

Concluding remarks: A temporary ceasefire and the IEBC’s ‘chicken’

Two events taking place less than one year ago inform our concluding remarks on the realities, challenges and opportunities of making the IEBC a dependable institution in Kenya’s electoral process. One has to do with the polarised nature of the Kenyan society as manifested in the events of July 2014 following the opposition CORD’s announcement for the commencement of countrywide political rallies. The second has to do with the perpetuation of corruption within the electoral body as manifested through the infamous ‘chicken gate scandal’. A few days preceding July 7, 2014, CORD announced the commencement of countrywide rallies to press the Jubilee government to deal with a number of national issues, including escalating insecurity, high cost of living, extensive official corruption, tribalism and skewed public appointments, violation of the constitution and the disbandment of IEBC. Media reports especially on why the IEBC should or should not be disbanded captured the polarized nature of Kenyan politics. For CORD members, time is ripe for a referendum to chart the way forward and this should be run by the UN since the IEBC has failed. For Jubilee, the sanctity of IEBC should be maintained. This was ably captured by one Jubilee commentator who argued that “if Raila wants to be the president of Kenya in 2017 then he has to be the IEBC chairman at the same time as the presidential candidate failure to which he will continue to complain that his victory was fraudulently snatched by the ruling coalition” (*Daily News*, 2014).

What these polarised positions on the IEBC mean is that the 2013 elections represented only a case of a ceasefire on a number of national issues. Perhaps to avoid further procrastination on such weighty national issues, it is imperative that both the Jubilee administration and CORD seize the opportunity to address them. In particular, there is need for frank and open discussions on the IEBC to restore public confidence in it before the 2017 elections. As Kenya's electoral history seems to show, such opportunities are necessary in ushering in an era of peace and socio-economic development that would benefit all communities and unite the country.

In February 2015, a London court sentenced two officials of a UK based printing firm three years in prison and 250 hours of community service for bribing Kenya's Electoral Commission officials. The duo, executives of Smith and Ouzman Ltd, were found guilty of paying out bribes worth Kshs 50 million and dubbed 'chicken' to Kenyan electoral and examinations executives. The electoral officials said to have been bribed include Chairman Hassan, former CEO Oswago and Cabinet Secretary Davis Chirchir, who worked at IEBC at the time. This 'chicken gate' scandal seems to be reigniting fresh debates on the past and future role of the IEBC in Kenyan elections. On the one hand, the scandal has cast doubt on the credibility and impartiality of the officials during the 2013 elections. To what extent could we not possibly believe the opposition narrative that the officials were corrupted to influence the outcome of the 2013 elections? On the other hand, this scandal raises doubt about the nature of the past reform process and whether the electoral reform agenda meant anything to the electoral body? How would a successful electoral reform agenda look like and what mechanisms should be adopted to appoint credible and impartial persons to be in charge of elections? These, indeed, raise important issues to ponder.

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Somewhere Between Truth and Peace: Understanding the News Coverage of Kenya's 2013 Elections

NICHOLAS BENEQUISTA

Introduction

In the wake of Kenya's 2013 elections, a debate has simmered over whether the mainstream media sacrificed its duty to report the truth to preserve the peace. While the discussion has been fruitful, it has placed undue emphasis on journalistic agency, without taking into consideration the structural factors that contributed to shaping the coverage. Based on interviews conducted with more than 20 senior editors and journalists, this chapter seeks to deepen the conversation by shedding light on what choices Kenyan journalists actually had—and how those choices might be widened in the future.

During the week that Kenyans awaited the results of the 2013 elections, the hashtag *#someonehellcnn* was filled with a stream of comments mocking and criticising the network's coverage of the event.

"#Someonehellcnn Kenya just concluded counting of votes peacefully. Kenyans going on with their businesses as usual. No violence to report." (Ronnie 2013)

Though one particular report by CNN bore the brunt, some denunciations were directed against other media outlets and against the foreign press in general.

“BREAKING: Foreign reporters clash in #Kenya amid growing scarcity of bad news.” (Juma 2013)

Meanwhile, two foreign journalists shared their own criticism of the national coverage: one was an article by the Associated Press (Straziuso 2013), and the other a blog on the New York Times’ website by Michela Wrong (2013), who is well known in Kenya for her biography of corruption whistle-blower John Githongo. Both pieces claimed that the media had sacrificed its watchdog role for the sake of preserving peace. This sentiment was shared in a posting by a prominent blogger, Patrick Gathara (2013).

While the criticism of the foreign media’s coverage eventually subsided, debate continued—in reports, online and at numerous roundtables and panel events—over whether the national media erred on the side of caution. Had the media sacrificed its responsibility to seek the truth in order to preserve the peace, or was the national media sensibly exercising its other journalistic obligation to eschew sensationalism and to “minimise harm?”¹

It is worth noting that this debate has politically-charged significance. Kenyans remain divided on whether the electoral process was flawed to a degree that may have altered the outcome. International observers endorsed the elections, and the results were upheld by the Supreme Court after a legal challenge, but that has not put the matter to rest. There is a profound challenge in the task of being critical on this topic while also avoiding the pitfalls of such a polarising issue, and this article can be taken as a cautionary tale on the usefulness of taking a politically-framed question as a starting point for research. The parameters of the debate obscure a more important question about how the Kenyan media coverage of the election was structurally determined.

This chapter reports on research conducted with senior editors and journalists on the behind-the-scenes decisions that they made while covering the elections—not the issues or the candidates, but the coverage of the vote itself. This chapter will not seek to settle the above debate, but to deepen it.

Background

The spectre of violence loomed over the 2013 elections and its news coverage. In the country’s previous presidential elections, amid widespread allegations of vote-rigging on both sides, political violence had torn at the country’s ethnic seams, particularly those related to historic grievances over land distribution in the Rift Valley. Some 1,133 people were killed and 350,000 displaced before the

fighting ceased (CIPEV Report 2008:346, 352). The role of the media in those tragic events has been partly documented.

Studies show that the hosts of call-in shows on local vernacular radio stations, by failing to moderate responsibly, inadvertently gave a forum to hate speech that helped to fuel the violence (Ismail & Deane 2008). One journalist is on trial at the International Criminal Court (ICC) at The Hague for allegations that he deliberately used his radio platform to provoke attacks.²

New communication technologies, meanwhile, played a decidedly mixed role. Short message services (SMS) on mobile phones were certainly used to spread rumours and hate speech, and to help mobilise violence (Cheeseman 2008). But activists concerned about the escalating violence also used new communication technologies in an unprecedented effort to document post-electoral violence. The platform they created, *Ushahidi*, has since been used for electoral monitoring and crisis mapping in innumerable other contexts, and gave rise to a non-governmental organisation by the same name that plays an important role today in Kenyan society.

The role of national media is perhaps least understood. Though the decisions of national news outlets have certainly been scrutinised within the industry, this topic has been relatively neglected in the research literature. Several observers considered the mainstream coverage leading up to the election to have been responsibly conducted (Cheeseman 2008), but there have been serious concerns raised about how major news outlets responded to the violence (Reporters without Borders *et al.* 2008).

Television news channels carried live the heckling of the chairman of the Electoral Commission of Kenya Samuel Kivuitu on December 30th 2007 as he read revised results that put Mwai Kibaki ahead of Raila Odinga for the first time during the tally, when he had previously been trailing by as many as 900,000 votes. Kivuitu announced Kibaki as the victor in a separate broadcast that day, though he later declared in January 2008 that he did so under considerable pressure and that he 'was not sure if Kibaki had won the election fairly' (Njogu 2011).

TV stations also broadcast live Raila's denouncement of the results as fraudulent. As the violence spread that evening, mainstream news media went quiet in what has been termed a media blackout. According to a joint report by Reporters without Borders, International Media Support and Article 19, this is only partly explained by the government's ban on live reporting. Backroom pres-

sure from government officials and fears of exacerbating the conflict may have led to self-censorship at media houses, according to the statements the report cites (Reporters without Borders *et al.* 2008). And if subsequent international support for Kenyan media is any indication, there is an assumption that coverage then suffered from a lack of knowledge about how to report responsibly in violent circumstances. Several media development organisations, including Internews Kenya and the Institute for War and Peace Reporting, have since invested heavily in training programmes in Kenya that emphasise conflict-sensitive reporting.

Unfortunately, all this is largely conjecture as there has been no systematic examination of the decisions made at major news outlets about coverage of vote-rigging allegations or about the coverage of the violence itself. The research into the coverage of the 2013 elections presented in this chapter provides a unique perspective on these issues.

Methodology

This report draws from semi-structured, qualitative interviews with more than 20 journalists and senior editors in March and April 2013: a sample from all the major media houses except Mediamax, which did not provide significant coverage of the event. Respondents were asked to be specific about the editorial instructions that they gave or received for coverage of the elections, about the choices that they made at difficult moments, and about what, if anything, they would have done differently. They were asked for their views on peace, truth and justice, and questioned as to how the politics played out in the newsroom during these elections, as compared with the 2007 vote. The questions focused on how media houses covered the electoral process.

The interviews were documented by hand by the interviewer, with the notes typed the same or next day. The interviewer captured some direct quotes, though most of the answers were paraphrased. All of the respondents who participated in interviews for this chapter were assured of anonymity, and interviews will be cited throughout the text by a simple code (non-chronological) and the data conducted.

The analysis of this research was greatly strengthened with input from a group of leading journalists who are affiliated with the *Networked News Lab*, which is a part of a larger research project into the nature of journalistic agency in Kenya. In addition to the 20 interviews conducted, six members of the

Networked News Lab helped to shape the questions and the selection of respondents. They also participated in a half-day workshop at which preliminary results from the interviews were shared and discussed.

The research did not conduct a content, thematic or discursive analysis on the coverage itself, but the in-depth knowledge of that coverage by members of the Networked News Lab certainly informed the analysis. The research, merely for the sake of focus, also chose not to include the role of opinion pieces, or the role of newspaper editors whose responsibility it is to select those contributions. The interviews, though, did include some television programme hosts who have commentators on their show and questioned them, in part, about how they chose to manage the views broadcast on air.

The decisions behind the news coverage

The 2013 elections were carried out in a substantially different context to those of 2007. In the preceding five years, Kenya had seen significant political reform, including a new Constitution that paved the way for decentralisation and the creation of a new electoral agency, the Independent Electoral and Boundary Commission (IEBC). Newsrooms too had changed. Many of the senior editors and journalists active in 2007 had since left the scene.

Since the previous elections, almost all newsrooms had made efforts to improve balance and editorial transparency, and in the run-up to the vote, major media houses had all subscribed to a code of conduct for electoral coverage disseminated by the Media Council of Kenya and the IEBC (Media Council of Kenya 2012). Media houses had also contributed, in various ways, to communication campaigns to promote peace, such as Royal Media Services' "Peace Caravans."

Some of the messaging from these campaigns, like the call to resolve electoral disputes in the courts, seeped into news coverage, especially talk-show programmes. According to the interviews, this happened in some instances by explicit instruction from management, but it may also be the case that the messaging campaigns simply had a direct influence on the discourse used by talk-show hosts (Interviews 13 and 14; April 8 and March 27, 2013). Several journalists cited the judicial reforms that gave courts independence as an important factor that distinguished the 2013 elections from the 2007 vote—saying that street mobilisations would not be the only recourse for candidates affected by electoral rigging (Interviews 01 and 02; April 1 and April 18, 2013).

As mentioned previously, the research interviews focused on how journalists covered the actual vote. The first major issue related to this was the move to an electronic voting system, including the creation of a new electronic registry with biometric information that was intended to prevent fraud. However, the procurement of the electronic voter registration kits was marred by delays and by allegations of corruption in the tendering process (Obuya 2012).

Respondents at two of the newspapers that followed the story closely said that their managers eventually stifled coverage of the scandal by telling journalists to cite more sources on the allegations. At one media house, this was perceived as a genuine effort to maintain standards on a story with high stakes and to protect the newspaper from being embroiled in an internal rivalry between the chairman and CEO of the IEBC. At the other media house, the editor, who had told the reporter working the story to gather more information on the request of a senior manager, had a more cynical take.

“When editors kill a story, they don’t actually kill it; they raise the bar,” the editor said (Interview 03; April 3, 2013).

Nearly all the digital components of the election system were plagued by problems. When electronic voter identification machines began to fail on the polling day (for various reasons), IEBC made the decision to turn to a manual system, using the “Green Book” of registered voters. The breakdown of the system managing the electronic tally and transmission of votes occurred on the day after voting, forcing the IEBC to call Tally Officers back to the capital for a manual tally of the results from each polling station (using each polling station’s Form 34). During this time, allegations surfaced that hackers had accessed the electronic tally system and were fabricating results.

At the national tallying centre, journalists were aware that there was a problem with electronic transmission by late afternoon because the real-time tally updates being projected onto a big screen for journalists and other observers had frozen.

However, the journalists reported that there had little access to commentary from the IEBC until 11 pm, when they received a short statement from the CEO and the IEBC’s spokesperson. The journalists said they did not feel any pressure to investigate the issue from their superiors, and did not feel well-informed enough to take the initiative themselves.

Back at headquarters, editors who were in charge of coordinating the coverage were sleep-deprived and overstretched. Even those who felt the break-

down in the electronic transmission should have been covered did not know where to turn for more information than the IEBC was willing to provide.

Top-level editors meanwhile had better access to IEBC officials and to candidates. They described an entirely different set of circumstances. They were actively managing the situation. Senior editors recounted how they had called senior IEBC officials in these instances, and consciously wielded the threat of critical coverage to secure assurances from them that the IEBC was working to preserve the integrity of the vote (Interviews 04, 06 and 12; April 19, April 17 and April 4, 2013). In effect, they were privately exercising their watchdog role, without running the risk of fomenting violence.

Editors such as NTV's Linus Kaikai are on the record as stating that media houses placed too much trust in the IEBC. In interviews, they were more specific. They equated the media's role in discrediting the defunct Electoral Commission of Kenya in 2007 with the violence in those elections, and were deeply reluctant to repeat what they viewed as a mistake. According to one senior editor:

At some level we were aware of what happened in 2007. We're not crusaders for peace, but we have to keep that in mind. We can criticise, but we can't discredit the process. There has to be no doubt, even if criticising the failures, that it [the IEBC] is the only institution legally sanctioned to carry out elections... We can question, but don't want to go to a "don't know" situation. (Interview 06; April 17, 2013)

Editors and journalists were faced with several other moral and professional quandaries in the course of the elections: whether or not to air statements by political candidates live, how to cover a skirmish between party observers and IEBC officials that resulted in a partial eviction of party observers from the tallying area, and how to handle the inconsistencies in the figures on IEBC's website and the figures announced at the Bomas centre (Interviews 09, 12 and 15; April 4, April 4 and March 26, 2013). There was also a question of how to balance coverage of the presidential race, Senate and National Assembly seats, gubernatorial races, and other locally elected posts. As the counting of votes carried on throughout the week, tensions began to rise and more rumours surfaced. Even before the final announcement of Uhuru Kenyatta's victory, it was clear that the presidential race would be decided in court. That certainty contributed to a sense among journalists and other interested observers that there would be time for scrutiny later.

As one presenter said:

“We did what needed to be done. I would still prefer that the person talking should not be me. Let it be the Supreme Court... We did a good job of being as neutral as we could be.” (Interview 09; April 4, 2013)

The myriad examples that surfaced in the interviews, and informal observation conducted by this author as a volunteer with *Uchaguzi*, one of the election monitoring efforts, suggest that it would be myopic to focus on the media as solely responsible for how the event was represented. That week was hectic and complicated for newsrooms—and for the country. Political parties, civil society organisations, international observers, social media commentators and the very citizens who spoke with journalists while waiting in the long queues all made decisions that had repercussions for the coverage, and those decisions were more often than not to remain quiet.

The network of civil society organisations comprising *Uchaguzi*—including the Constitution and Reform Education Consortium and *Ushahidi*—chose not to speak with journalists for fear of exacerbating a tense situation that week. Similarly, the Election Observation Group made no public statements until well after the elections. Even politicians were reluctant to comment to senior editors on controversial aspects of the electoral process during the tally.

Citizens too played a role. In several instances, the editors and journalists reported feeling pressure from the public, particularly via social media, not to air comments that might inflame the situation. One journalist reporting from the Rift Valley found voters there unwilling to talk to her; she was told, “You found peace here. Don’t start trouble.” (Interview 16; April 5, 2013)

Between truth and peace

Among critics and defenders of national media alike, there are often unspoken assumptions about how news people work. Among critics there are those who would emphasise the alleged “gentleman’s agreement,” suggesting a kind of collusion among media elites that was then transmitted by orders to rank-and-file journalists. Other critics suggest a more organic process of self-censorship, in which they imagine journalists individually making decisions in favour of preserving a peace narrative on the assumption that critical reports might incite violence.

Likewise, the interviews and comments made on the topic in public forums show that those who would defend the coverage sometimes see senior news managers as acting conscientiously to navigate corrupt and polarised institutions through a difficult period, or instead emphasise the responsibility demonstrated by individual journalists—perhaps even in spite of top-down pressure to politicise and sensationalise coverage.

The question inherent in both perspectives of how coverage organises itself in Kenya is central to this research, and has been a topic of fundamental concern to the sociology of journalism for decades. The sociology of journalism has, in particular, been absorbed in a debate about what determines the messages conveyed in news texts, weighing up the relative influence of media owners, market forces, organisational demands, the structuring power of journalistic routines, elite sources and cultural tropes (Tuchman 1978; Gans 1980; Pedelty 1995; Reese 2001; Murdock & Golding 1974).

There is certainly some element of top-down control in the newsrooms. Senior editors, for example, agreed to delay their reports on the Mombasa Republican Council attack in order not to affect voter turnout. But, as the case of the investigations into the procurement of the BVR kits testifies, the underlying motivation of an order is subject to interpretation by those who receive them.

The diverse and sometimes competing ways that journalists made sense of moments such as this one suggests that no simple narrative will suffice. Indeed, journalists and editors responded in one of three ways: some were critical of the coverage, some defended it and some were ambivalent. Reflecting a common pattern in their responses, these three groups might be labelled the *truth-seekers*, *professionals* and *pragmatists*.

The respondents who were most critical tended to emphasise the ethical obligation of journalists to pursue “truth,” such as this senior journalist:

“We should have trusted the public more... We might have seemed more balanced, but the media overall wasn’t true to the facts given the overall goal of trying to avert disaster.” (Interview 12; April 4, 2013)

The defenders of the coverage, by contrast, evoked the responsibility of journalists to “do no harm,” particularly in their gate keeping role against rumour and vitriol.

“I didn’t write about MPs who came to make noise because they wanted to throw the country into chaos,” said one reporter. (Interview 08; April 15, 2013)

And then there are those—generally the most senior editors—who were less absolute in their position. This group rarely evoked journalistic norms or ethics, but presented their decisions pragmatically, emphasising their role in managing the situation.

These perspectives do come into direct conflict in the newsroom. The choice over whether or not to air polemical comments by Raila’s running mate Kalonzo Musyoka brought the truth-seekers and the responsible professionals into a heated debate in one newsroom, with the pragmatists arbitrating. But more often than not, the pragmatists, by handling the most controversial editorial decisions behind closed doors, prevent the debate from happening in the first place, possibly to the detriment of shared news values, though also possibly out of the necessity to preserve amiable working relations.

But perhaps more interestingly, the interviews point to a myriad of other ways that editorial decisions about coverage are *not* made, that these different perspectives (which echo the public’s own sentiments on the coverage) are not resolved through a consideration of how to cover events.

The last six years have taken a toll on the Kenyan media’s ability to set the agenda and to frame stories independently. In the effort to provide balance (and to preserve peaceful working relations in the newsroom), the media have put in place new editorial checks and balances that emphasise balanced coverage for each side of the political divide.

As one senior journalist put it:

“This time no media house wanted to be associated with one position. If you support Odinga, you won’t sell in Central.” (Interview 03, April 3, 2013)

The improved balance in news coverage has helped to maintain peaceful relations between editors and politicians, between editors and journalists, and between journalists and their audience.

The achievement of impartiality through the “right to reply,” however, has had its consequences. As illustrated by an analysis of the media’s coverage of the resettlement programme for people displaced by the post-election violence, politicised narratives are privileged by the imperative for fairness (Benequista &

Kang'ong'oi 2013). Audiences are forced to make a choice between contrasting accounts from either side of the political divide. Frequently, audiences can only make this choice based on how they assess the credibility of the source—a feature that seems likely to perpetuate partisanship.

Furthermore, this *modus operandi* broke down during the elections, when the fear of political violence demanded that journalists and editors exercise a stronger gate-keeping role—and that the usual newsmakers themselves exhibit an unusual amount of caution in their comments.

Under the circumstances created by the elections, journalists were not choosing whether or not to write certain stories, or whether or not to ask certain questions; to them, there was no choice. Individual journalists had only a narrow view of the larger picture. Those truth-seeking journalists privileged enough to see a wider panorama felt restricted in other ways, while often at odds with the legitimate concerns of peers who were not eager to be used by unscrupulous politicians. The conventional method of reporting political news had broken down, and the opportunity to practice novel forms of reporting was severely hampered with staff overstretched and potential sources reluctant to speak.

Conclusion

The most common approach to evaluating media coverage of elections is to define an international standard, compare the actual performance with the international standard, and then seek to understand why the media's performance differs from that standard. Examples of this nature are not difficult to find (Frère 2011; Temin & Smith 2002).

However, this study demonstrates how the more conventional approach to evaluating media performance neglects an opportunity to understand how the media changes, both by virtue of its own internal dynamics and by how it is embedded in wider processes of social change.

The interviews also cast some doubt on the ability of training courses to prepare journalists to confront the challenges of electoral reporting. Even well trained journalists (and many of those interviewed were well trained) would have confronted the same challenges.

Rather, the study suggests that future efforts to bolster the ability of Kenyan media houses to cover elections might focus on the structure of editorial decision-making, the way that staff are dispatched and managed, and the relationship between media houses and key sources of information. Further research and capacity building might also focus on the decisions that senior editors make about when to play a behind-the-scenes watchdog role.

The study also suggests that last-minute interventions will do little when the modes of reporting and narrative framings that will ultimately shape election coverage have been established years prior to the event. Furthermore, the way that elections are covered do not rely only on editorial decisions, but on the decisions of many actors who choose (or not) to speak publicly, and on how they do so.

This is not to say that individual editors and journalists have no agency to change the course of the coverage; in fact, they do. But a media development strategy should look more closely at how journalists can in fact influence coverage, and more honestly at the structural restrictions that prevent them from doing so.

Editorial practices are shifting in response to historical and political factors within the country and articulated through varied and competing perspectives within newsrooms. It is a time of profound change in Kenya's political landscape and news media and, however the coverage of the 2013 elections is historically judged, it will likely be remembered as a turning point.

Notes

- 1 See, for example, the Society for Professional Journalists' Code of Ethics: <http://www.spj.org/ethicscode.asp>.
- 2 Joshua arap Sang, from the Kalenjin radio station KASS FM is standing trial at the ICC along with Deputy President, William Ruto. Charges at the ICC against President Uhuru Kenyatta were withdrawn in December 2014.

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Information Technology, the State and the Voter in the Kenyan Election of 2013

WARIGIA BOWMAN AND GRACE GITHAIGA

Introduction

The importance of information and communication technologies in Kenya reached new heights during the March 2013 elections. Information and communication technologies (ICTs) were used in the general elections to encourage voting, provide information about candidates, promote “peace speech,” and, on the negative side, intimidate voters, such as instructing them not to vote. In addition, new ICTs were introduced by the Government of Kenya (GoK) to improve the accuracy of the election, as well as to control how people communicated about the election.

This chapter is organised as follows. First, we discuss what we know about the role of ICTs in elections and democratisation. We consider the use of social media in the period following the election, as well as the use of ICTs by the Independent Electoral Boundaries Commission (IEBC). We then focus the remainder of our discussion on the efforts made by the State to reduce “hate speech” over ICTs.

Methodology

This study relies on a variety of data, both primary and secondary. Primary data was collected from a variety of sources. A team of researchers and activists from different Kenyan language groups worked in collaboration on this research.

More than 100 voters responded to a semi-structured questionnaire administered in Kiswahili and English on the day of the election, and the following week. The focus of the survey was voters' use of technology, with a specific focus on Facebook and SMS telephony on the day before the election, and the day of the election. Further, Officials from the Ministry of Information, the Media Council of Kenya, the CCK, the IEBC, and the NCIC were invited to respond to a structured questionnaire on the role of the government in preventing hate speech. Although not all responded, we got responses from high-ranking officials of the Media Council of Kenya, and an influential NGO involved in the protection of freedom of expression. News reports by Kenyan media were carefully scrutinised for references regarding hate speech and political speech. The authors collected and reviewed relevant Kenyan regulations related to election speech. Data was coded, divided into themes, and analysed.

In terms of hate speech, our sample size on the election-day questionnaire is limited ($n=101$).¹ Accordingly, we view it as suggestive, not definitive. However, very little primary research has been conducted on this question, as indicated above, and none that we could find in Kenya. In addition, our objective was not to test a hypothesis. Rather, this unique dataset is valuable as a tool for generating grounded theory, and developing hypotheses (Glaser & Strauss 1967; Charmaz 1995; Crooks 2001).

The changing role of the internet in Africa and in Kenya

The takeaway from public statistics, regardless of the source, is that information technology is booming in Africa, and in Kenya. According to the World Bank, access to telecommunications services has increased dramatically since the year 2000 in Africa (Williams, Mayer & Minges 2011). As many as 247 million mobile subscribers joined networks in Africa between 1998 and 2008. Although telephony is increasingly widespread, the internet lags behind in Africa. For example, broadband internet penetration rates increased from near zero to about 19 million by 2010 (Williams *et al.* 2010) According to the ITU (2014), mobile broadband in Africa had a growth rate of 40 per cent. In Africa, nearly 20% of the population was online by 2014 (ITU).

By FY 2014/2015, Kenya recorded 36.1 million mobile subscriptions, with a mobile telephony penetration rate of 83.9 per cent (CAK). The number of data/internet users in Kenya reached 19.9 million over the same period, with mobile data/internet subscriptions comprising 99 per cent of total subscriptions. These

reports indicate that mobile telephony remains the dominant technology for communication both across Africa, and in Kenya. Although internet access is growing, it is largely urban, and far behind mobile telephony.

The internet, social media, and elections in Africa

Before we delve into the role of ICTs in the Kenyan election of 2013, a review of scholarly materials on the topic is warranted. What do scholars know about the internet, social media, and other ICTs in African elections? Information on the role electronic media plays in politics on the African continent is limited, with little scholarly work empirically examining the role of electronic media in African elections.

The role of information technologies in democratisation and governance

Several scholars argue that the internet can greatly assist citizens in challenging non-democratic regimes and improving transparency and accountability in democratising contexts (Fung, Russon Gilman, & Shkabatur 2013b; Xenos & Moy 2007). ICTs may encourage political behaviour in individuals while also enhancing political connectivity among individuals (Fraga 2007). For example, under certain conditions, the internet has increased political participation in social movements (Feezell, Conroy, & Guerrero, 2009; Kelly Garrett, 2006; Tolbert & McNeal, 2003). Indeed, in more authoritarian societies, the virtual public sphere may be particularly vibrant in the absence of formal laws that protect free expression and independent media (Bimber 2003).

Scholars also argue that ICTs may facilitate collective action and organisation by political groups (Krueger 2006; Shirky 2011; Tufekci & Wilson 2012). However, there is a darker side to this equation as cyber-technologies can be and have been used by governments to enhance surveillance and control communication (Deibert & Rohozinski 2010; Shirky 2011; Rodan 1998). Increasingly, authoritarian governments have attempted to control the internet to suppress political activity (Shirky 2011). More dramatically, authoritarian governments are willing to go so far as to attempt to shut off ICTs completely to control protest and limit dissent (Bowman & Camp 2013).² Regardless of how governments handle them, new communication technologies may make the political environment less stable and more predictable for both individuals and groups (Bimber 2003; Dale & Strauss 2009; Valenzuela 2011).

There have been few studies conducted to empirically examine ICTs in politics and elections in the African context (C.S. Bailard 2012). Bailard's groundbreaking work in Tanzania reveals that the Internet negatively influenced individuals' perception of the fairness of both the election, and the subsequent recount. Ligaga (2012) makes the important point that the internet in Africa in particular represents a relatively unmediated space of discourse, which is independent of mainstream media, and fairly free of state-centric control. However, this space is also rife with contradictions, where Africans—consciously or unconsciously—reconstitute hegemonic practices of ethnic prejudice and tribalist ideas. In synergy with Ligaga, Chisango and Gwandure (2011) assert that elections in Sub-Saharan Africa are characterised by “rhetoric and hate speech” against opposition parties, particularly on web blogs and internet media.

Emergence of new ICTs as a factor in Kenyan elections

In the Kenyan election of 2007/2008, in addition to traditional media and information technologies such as the radio or print newspapers, SMS, cellular telephony, the internet, and social media such as Facebook emerged as new, rapid avenues for the distribution of both “hate speech,” as well as “peace speech” (Ring 2013).³

Before we return to an examination of the role of technology in the 2013 election, the comparative peacefulness of the 2013 election is worth some reflection and comment by political scientists and communication scholars. Importantly, Kenyan multiparty elections from 1992 to 2013 have all been characterised by varying levels of politically-sponsored violence in the form of “ethnic clashes.” Former Kenyan President Daniel arap Moi skillfully privatised violence in a bid to stay in power while also following donor demands for multiparty elections. In order to accomplish both goals simultaneously, Moi sponsored ethnic clashes around election periods beginning in 1992 (Roessler 2005). Indeed, scholars have argued that in highly contested elections, electoral violence may be a mechanism to force ideological voters of the competing party to vote in their favor, or to prevent them from voting at all (Chaturvedi 2004).

In the 1990s, one of the key goals of political violence was to disrupt and disenfranchise opposition members to ensure a Moi victory at the polls. In 1992, in an eerie premonition of 2007's election violence, at least 1,500 people were killed, and 300,000 displaced (Human Rights Watch 1994:2). The 1997 election

was widely characterised by communal violence and foul play (Barkan 2004). Violence escalated before and after multiparty elections in 1997 (Klopp 2001). The KANU government under President Moi created militias of local youths to engage in ethnic clashes, paying them for each person killed. This multi-ethnic violence was part of a strategy of derailment (Klopp & Zuern 2007). Strikingly, according to Klopp and Zuern, there were few ethnic clashes in 2002, in part because President Mwai Kibaki may have promised retiring President Moi impunity for crimes under his rule (*ibid.*)

A technological shift occurred in the 2007 election, media such as cellular telephone and radio played a role in the spread of “hate speech,” which was viewed as one of the possible drivers of electoral violence. Indeed, many studies have considered the fact that the genocide in Rwanda in 1994 was facilitated by older ICTs, such as radio. Yet, as the 21st century comes of age, Kenyan citizens and voters are now increasingly likely to communicate with new media, including, short message service, email, and internet applications such as Facebook. The internet and other electronic media increasingly play a role in disseminating political speech and campaign information very quickly to large groups of people.⁴

During the Kenyan Election of 2007/2008, activists, citizens and vigilantes propagated hate speech by means of both old and new electronic media, (radio, the internet, text messaging, and television). Militias organised over text messages, calls to violence were made in the vernacular on indigenous FM radio stations, and blogs encouraged score settling over land seizures (Africa Confidential, 2008). Additionally, mobile phone messages (texts, short message service or SMS) were used to instigate negative intra-group emotions. In particular, attention should be paid to mobile phone messages because of the very high penetration rate of cellular technology in Kenya.

Ushahidi, Uchaguzi, and crowd-sourced publics in Kenya

An important ICT innovation related to Kenyan elections that emerged out of the 2007 elections was Ushahidi (meaning “witness” in Swahili). The Ushahidi platform was developed as a source of information for reporting on 2007 post-election violence (Marsden 2013:52–53). Ushahidi was technically enabled by open source GIS and remote sensing technologies as well as the increasing ubiquity of mobile phones in Kenya (and across Africa) (C. Bailard, Baker, Hindman, Livingston & Meier 2012:6).

The idea of Uchaguzi (meaning “election” in Swahili) was born out of Ushahidi. It was initially launched during the 2010 Constitutional Referendum in Kenya (Craig 2013; Omenya 2013:9). In 2013, Uchaguzi was deployed for the Kenya 2013 elections. By March 18 2013, Uchaguzi generated 4,964 total and 2,699 verified reports (Felix 2013: 25; Omenya & Crandall 2013:2; Mbuvi 2013). According to Ushahidi, evidence of election irregularities were passed on to IEBC, NSC, and the Red Cross, and citizens reported seeing security personnel deployed shortly after their reports were sent to Uchaguzi (Akpedonu, Lumsdaine, & Sow:13–14; Omenya 2013:30).

The use of ICTs by the IEBC

In addition to the changing use of cellular telephony and social media, and the emergence of Ushahidi and Uchaguzi, another very important ICT development in the Kenyan elections was the use of ICT by the Independent Electoral and Boundaries Commission (IEBC). Indeed, it was a historic moment for the nation, the African continent and the world when the IEBC announced on March 9, 2013, that Uhuru Kenyatta, son of independence leader and first Kenyan President Jomo Kenyatta, had been elected the fourth president of Kenya.

Yet, on March 9, 2013, the Kenyan presidential race was far from over. Raila Odinga, Kenyatta’s main political opponent, challenged the result in the Supreme Court. Odinga wanted the court to nullify IEBC’s declaration of Kenyatta as President-elect. He also sought to persuade the court that the whole electoral process leading to that declaration was null and void and that a fresh poll should be held. A core component of Odinga’s argument was that the electoral technology deployed by the IEBC failed on election day.

The chaos and violence of the 2007 elections highlighted the need for the government to find mechanisms in the 2010 Constitutional Referendum and various by-elections in an attempt to enhance the credibility of results. As part of its approach, the government determined—whether rightly or wrongly—that more technology would enhance the security and credibility of the elections. The plan was that the 2013 elections would represent a technological apex for voting. The vision was to use technology for two key aspects of the voting process.

The first application of technology was to guarantee the integrity of the voter register through the use of a Biometric Voter Registration system that was acquired at a somewhat spectacular cost of \$95 million (USD). The voter regis-

tration exercise was conducted over 30 days towards the end of 2012 and was lauded as a success with over 14 million voters registered. This voter register was made available at each polling station in two forms, a biometric Electronic Voter Identification device (EVID or Poll Book) and a printed copy. Both of these methods served the same purpose: to authenticate the identity of each voter before they vote.

The second was to provide an electronic method of transmitting *provisional results* (votes counted and verified by party agents at polling stations). This was to facilitate rapid announcement of the provisional vote count with results being physically delivered to the National Tallying centre for the official, final tally. The IEBC received technical assistance from the International Foundation for Electoral Systems (IFES) under a USAID-funded program.

Mid-election, technical irregularities began. Nationally, there was widespread failure of the EVID Poll Books due to batteries running out of charge and the lack of electricity in polling stations. Many of the cell phones meant to transmit provisional results to the tallying centers also did not work due to forgotten passwords, low battery and data connection problems. Finally, computer servers at the national tallying center collapsed. The IEBC was forced to suspend the announcement of provisional results and await submission in person of official results using the manual forms (Form 36) submitted by constituency returning officers.

Two things stand out here: the IEBC's late procurement of both services and equipment related to the election, and the fact that all technology should have been tested and debugged far in advance of the election. Importantly, the failures that occurred during the election were both foreseeable and preventable. Of note was the failure to plan for backup power. Electricity fails routinely in Nairobi, and is often absent in many rural areas altogether. In addition, the cell phones and biometric scanners were not procured until approximately one month before the election, and were most likely not tested sufficiently for either load or other stresses. Professor Makau Mutua asks whether the collapse of the computer systems during vote tallying was due to incompetence, technological illiteracy, or lack of adequate preparation (Mutua 2013). In the authors' view, the most likely answer is a lack of adequate preparation, combined with a failure to follow good advice.

Did technology lead to a better election?

Importantly, for all the money and training spent by the IEBC on implementing the use of ICTs in the 2013 election—due to the failures of procurement, equipment, hardware, and gaps in electricity—at the end of the day, the physical count of votes was the final and official record of the election. This was a massive failure of both planning and technology.

Despite this technological meltdown, the manual voter register worked well to identify voters at the polling station level. No vote count was finalised at the polling station level without agreement of the presiding officer and political party agents. This process was repeated as all presiding officers reported their numbers to the reporting officer in full view of political party agents and observers at the constituency level. All marked and unused ballots were locked into the transparent tally boxes with final numbers. Those boxes were trucked from polling station level to the constituency level, and eventually flown to Bomas to ensure that the final vote was correct.

The 2013 election can teach scholars and observers of democratisation numerous lessons. In the future, electoral bodies, particularly the IEBC or its successor, must learn the lesson that a completely successful election in Kenya as well as other parts of Africa depends on large part on processes with high levels of transparency, consensus, and a careful chain of custody of votes. Second, technology must be carefully tested far in advance of elections, and care should be taken to identify weaknesses. Third, governments and civil society can work together to create independent institutions with clear rules, and well-trained voting officials. Finally, the 2010 Kenyan Constitution has helped to create institutions and laid out rules to promote democracy, which has already led to improved electoral outcomes. Regardless of what hardware, software, or other technology governments choose to employ to strengthen elections in emerging democracies, careful attention must be paid to the institutional and organisational infrastructure to ensure credible elections.

Social media use by citizens in Kenya's 2013 elections

As previously touched upon, in addition to the use by non-profit organisations of ICTs to implement Ushahidi, Uchaguzi, and the government's use of technology at the IEBC (albeit with limited success), citizens also used ICTs broadly in the elections. The country of Kenya has more than 21 million Internet users,⁵ many of whom make use of various social media sites to discuss different topics

though current affairs and politics seem to catch the attention of many. Facebook debates, twitter ‘meetings’ and google hangouts are common in Kenya among the urban elite: they provide immediate access to communicate directly with like-minded followers and provide space for two-way engagement.

In the run up to the 2013 general elections, social media was used by the media and donors to urge Kenyans to remain peaceful. Presidential candidates were not left behind in their use of social media to reach out to voters. One interesting political use of social media in the election was when international media CNN showed four “militia” preparing for war in the Rift Valley region.⁶ This report was quickly dismissed by Kenya’s prolific online community as a fabrication intended to malign the country’s reputation. Kenyans on twitter (KOT) were determined not to allow the international media to report falsehoods and hence the twitter hashtag #SomeoneTellCNN emerged.

Government efforts to control political speech and hate speech

As a response to the violence which characterised the Kenyan elections of 2007, in the run up to the 2013 elections, the government sponsored unprecedented new levels of control on speech over electronic media as well as traditional media.

Clearly, hate speech was a crucial issue in the 2013 elections. All governments, including Kenya, face a brave new world in the face of rapidly changing political communication behavior by citizens. Whereas some governments have responded with a fairly *laissez faire* policy towards political communication, the Kenyan government policy combined a mixture of regulation, control via software and hardware, as well as repeated public pronouncements designed to affect citizen behavior. The Kenyan government’s efforts approached censorship, while not actually reaching that threshold. Rather, their efforts could be viewed as an effort to psychologically intimidate voters into eschewing hate speech.

Newer ICTs, such as social media, throw a wrench into efforts to reduce or eliminate political speech, because they are much more difficult to regulate and censor than traditional print or broadcast media. At some level, each user becomes a publisher. As a result, repressive governments have taken some extreme measures to control political communication over electronic and social media, including blocking Twitter and Facebook, and even shutting off cellular

telephony and the internet for short periods in countries like Syria, Egypt and the Sudan (Bowman & Camp 2013).

In this regard, the Kenyan government arguably adopted a hybrid communication control strategy regarding political communication during the 2013 election that stopped just short of outright censorship. The government created an extensive regulatory regime. This regulatory framework had three key components: first, eliminate anonymity of subscribers to better allow tracking, and possibly prosecution of hate speech, second, force ISPs to employ sophisticated software and hardware that can assist in filtering information, and finally, work with media houses to launch a pervasive campaign aimed at behavior modification.

Regulatory efforts to control hate speech

Under the Information and Communications Regulations of 2012, Internet service providers (ISPs) were ordered under article 4 (c) to “register users of its system, keep a record of all registrations of subscriptions made, and provide a copy of this record to the regulator upon request by the Commission.”⁷ Due to citizen non-participation in registration with ISP refusal to comply, this approach registered a large number of cell phone users, but certainly left a large minority unregistered.

In March of 2012, about 10 months before the election, ISPs were expected to install gadgets that would eliminate anonymity of e-mail senders and other Web users by December 2012. This effort was pitched by Michael Katundu, the Communication Commission of Kenya’s (CCK) acting director for Information Technology as critical to the “war against terror.”⁸ In March, the CCK demanded that mobile operators cooperate in installation of the Network Early Warning Systems (NEWS), an internet traffic monitoring equipment. This equipment allows the CCK to monitor both incoming and outgoing email traffic “in an effort to detect and facilitate response to possible cyber threats.”⁹ According to Citizen Lab, other countries which have employed such domestic surveillance tools include Afghanistan, Bahrain, China, India, Indonesia, Iraq, Kuwait, Lebanon, Malaysia, Nigeria, Qatar, Russia, Saudi Arabia, South Korea, Singapore, Thailand, Turkey, and Venezuela.¹⁰ The fact that Kenya is on this list is not definitive, but it suggests that the Kenyan State currently values security and surveillance over privacy and freedom of expression.

ISPs protested that the software was in breach of Article 31 of the Kenyan Constitution, which grants citizens the right to privacy, including a clause preventing infringement of “the privacy of their communication.” Prominent Kenyan lawyers also protested. rPaul Muite asked that the Kenyan government instead seek a court order before installing the sensors.

Safaricom, a major mobile telephony provider and ISP in which the Kenyan government has a significant number of shares, issued guidelines in June 2012 for political mobile advertising aimed at reining in negative political messages nearly nine months ahead of the General Election. In September 2012, the CCK issued similar guidelines. Political text messages were limited to English and Swahili (BBC News, February, 2013). Politicians had to send bulk campaign messages for screening through their mobile operators 48 hours in advance (*ibid*).

Hate speech was criminalised through the passage of the National Cohesion and Integration (NCIC) Act of 2008.¹¹ The NCIC was established in 2008 as an independent body to spearhead national reconciliation, cohesion and integration and to eliminate discrimination, especially ethnic, racial or religious discrimination after Kenya went into post-election violence. A key provision in this Act is in Section 62 which holds liable any media enterprise for publishing any utterance which amounts to hate speech.

By February 2013, the NCIC had flagged key vernacular words in Kikuyu, Luo and Kalenjin that those communities, who were implicated in the 2007 electoral violence, might use to insult each other. Key words such as “thief,” “uncircumcised,” “dog,” “monkey,” and other animal phrases used in political contexts were expressly flagged by the National Cohesion and Integration Commission, because these phrases had been widely used during the 2007/2008 election violence (Capital FM, February 7, 2013). Those found guilty of “fanning hatred through text messages,” faced fines of up to \$56,000 or three years in jail (BBC News, February 2013). These measures could generally be described as intimidation. However, in reality, the government’s zeal to prosecute offenders can be drawn into question. Further, it does not require a linguist to effectively circumvent these measures, by simply avoiding the phrases flagged by the government, and rewording comments.

Warning notices were sent in February to as many as 30 bloggers. The NCIC closely monitored political campaigns. For example, government-sponsored NCIC field officers went so far as to attend political rallies to monitor what was

said, and warning those they believed were guilty of incitement (Africa Research Bulletin, 2013). Further, the independent Media Council of Kenya, created by article 34(5) of the Constitution, monitored radio stations, TV channels and newspapers round the clock to clamp down on “retrogressive utterances” (BBC, February 2013). Former Permanent Secretary for Information and Communications, Dr. Bitange Ndemo, reported that cell phone service providers blocked 300,000 hate short message texts (SMSs) per day to prevent a repeat of 2008 post-election violence.

The final prong of controlling political communication was a massive media campaign promoting peace. As the BBC aptly noted, “a media blitz of tolerance,” flooded the airwaves (BBC February 26, 2013). The Luo vernacular radio Ramogi FM hosted peace road shows and the Kalenjin-language radio station Kass FM played songs calling for peace and cohesion. Even the General Services Unit, the elite Kenyan crack military unit comparable to the Marines special forces, released a song called *Mungu Baba* (God is our father) in conjunction with the Kenya Symphony Orchestra highlighting ethnic and gender diversity, and praying for peace. Donors got involved as well. A USAID/Mercy Corps funded project, “Yes Youth Can,” created coding which allowed Kenyan subscribers to post directly to the project’s peace oriented website via SMS (The Futurist, 2013). UNICEF sponsored a song called Kenyan Patriotic Peace Song “Amani” by Boma, featuring photos of young people of different ethnicities, possibly located in Kibera, holding signs saying “Amani,” meaning peace in Kiswahili. Citizen responses to those measures will be discussed in more detail below.

Citizen behaviour as a response to State control

Based on an empirical study conducted by the authors during the week of the general election, we suggest that these efforts were largely, if not completely, “successful” in helping to control citizen communications during the elections. At best, the measures aimed to intimidate citizens. At worst, the measures could be viewed as potentially repressive. The word successful simply indicates that the measures were effective in suppressing potentially violent speech. This article in no way attempts to suggest that the use of these measures were desirable. Rather, the chapter hopes to start a conversation about the meaning of hate speech in the Kenyan Constitution, and to enrich the discourse about the line between preventing violence and curbing speech.

In our study, however, text messages were used more widely to distribute political messages among the day of the election than Facebook. This choice of communications medium makes strong sense, given the much broader distribution of cellular telephony than internet in Kenya. In the last quarter of 2012, the CCK reported that the percentage of the Kenyan population with access to the Internet stood at more than 41 per cent at the end of 2012, increasing from 28 per cent in 2011, with an estimated 17.4 million users.¹² Cellular telephone penetration rates in Kenya are extremely high. At the end of 2012, the number of Kenyan mobile phone subscribers stood at over 30 million, with a 78 per cent penetration rate.¹³ Although it is difficult to get good statistics about the distribution of telephony and the internet in rural versus urban areas, Internet is more prevalent in Nairobi and major cities.

SMS/Text messages

Based on our research, text messages represented a rich source of communication in this election, between candidates, voters, friends, relatives, and even strangers. At least 53 per cent of those in our study received text messages the day of the election. Family and friends often sent messages to encourage a fellow voter to go the polls. Friends and family were also highly likely to send messages of peace to each other.

"We need our country even after elections so we can continue with daily lives. Let us vote peacefully and avoid incitement. We are all Kenyans!"

Family and friends were also likely to encourage a voter to vote for a specific candidate or party, sometimes in a fairly direct manner. Despite the prohibition on campaigning, several messages with a clearly campaign based message were sent on the day of the election. Such messages were sent by friends, family, political parties as well as candidates. Respondents were often not clear about who had sent them the message, or where the messages had come from.

Despite repeated warnings on television, radio, newspaper, and social media, 14 per cent of our sample received messages that they characterised as "provocative." These messages range from intimidation to avoid the ballot box, to the extremely obscene, to the insulting. Many people were specifically intimidated and discouraged from going to the polls:

“You should not vote, you daughter of Osama bin Laden.”

“Even if you vote, your vote will not count.”

Several received messages that arguably fall under the category of political speech. However, these messages aim to get a point across, and hopefully persuade voters in a certain direction. Unfortunately, threats of force appeared in other provocative text messages in other forms.

“Democracy is kifua.” (You have to use force to get democracy)

Other types of political speech did not reference violence at all, but had provocative subtexts. For example, one incendiary message with no threat of violence read as follows.

“The IEBC is under pressure to rig the election.”

This message could be viewed as “inciting,” because it aims to weaken voter confidence in the electoral system. It was in part the breakdown in confidence that facilitated rioting in 2007/2008. It should be noted that one text message that went viral in 2007/2008 and led to rioting alleged—incorrectly—that Odinga had been imprisoned. Spreading misinformation via text messaging, blogging and Facebook may actually be more damaging than direct hate speech itself. It is also much harder to identify, filter, and stop misinformation. Notably, this message about the rigging by the IEBC contained no threats of violence, and no banned words.

We did not hear about any messages that suggested a certain ethnic group be attacked, but short of that, provocative messages ran the gamut. Interestingly, no one reported receiving a text message containing the “banned” vernacular words. Several persons we spoke to mentioned that they had been so offended by messages they had received that they deleted them immediately. Many of those who reported receiving provocative messages were so offended that they did not want to share the content of the texts they had received. Many of the texts that respondents found to be provocative are not specifically threatening, although several would be offensive to a party supporter, and contain a hint that a certain outcome may have dire consequences.

Umati

With adoption of ICTs by ordinary citizens and use of online platforms, the issue of how to deal with hate speech stemming from ethnic tensions that continue to polarise the country, is an increasingly urgent topic for elections.

The lead up to 2013 general elections witnessed citizens and politicians share information about their party manifestos and preferred candidates. Infact, hate speech migrated away from the radio, and towards the internet, particularly on blogs and social media platforms such as Facebook and Twitter.¹⁴ Much of the social media tension and hate speech emerged after the election was over and was witnessed when presidential hopeful Raila Odinga challenged President's Uhuru Kenyatta's victory.¹⁵ Odinga's petition saw an online battle between their supporters of the former prime minister and the newly elected president.

Hate speech poses a complex challenge to modern day constitutional rights to freedom of expression (Rosenfeld 2003:1523) with some Western governments criminalising it, while the US has given it constitutional protections under human rights treaties. Nonetheless, Delgado & Yun (1994:8) opine that regulation of private speech has no serious constitutional problems "as government aggrandizement is at best a remote concern."

During the electioneering period, the government monitored blogs and social media outlets for hate speech and consequently launched several investigations against bloggers for their alleged hate speech activities.¹⁶ However, it is not clear whether these cases were prosecuted. Lack of enforcement has been one criticism leveled against the NCIC Act. Additionally, there is not a clear framework to regulate online hate speech, although some activists feel that the government should step in to tackle hate crimes on the Internet when necessary.¹⁷

The Umati Project was, without a doubt, the largest effort to date to monitor hate speech online. This is a project that was conceived by Ushahidi and ihub research to examine incidences of hate speech online as a way of responding to the challenge of negativity online and contribute to a definition of hate speech (Umati 2013:5). Some goals for the project were geared toward suggesting a practical definition of hate speech, gathering and examining the incidences of hate speech in the online spaces, raising awareness on possible outcomes of online hate speech, and directing distress calls to uchaguzi platform.¹⁸ For nine months (September 2012 to end of May 2013) Umati, examined content from selected blogs, forums, online newspapers, Facebook and Twitter. Addi-

tionally, vernacular content was also monitored. In total, 5,683 statements were collected.

It is noteworthy that adoption of ICTs is on the rise in Kenya due to the available infrastructure. The International Telecommunications Union (ITU) estimated the rate of penetration at 32 per cent by end of 2012.¹⁹ However, even with this rise in Internet, there is still an inequality in access between rural and urban areas.²⁰ This state of affairs may have contributed to lack active use of Ushahidi platform to report hate speech occurrences. It can be deduced that 5,683 statements collected out of a population of over 40 million is an indicator that many citizens are not online, which becomes a limitation for Umati.

Thereafter, several suggestions were made, namely that most conversations online are a reflection of what is happening offline and is in need of redress, that most Kenyans prefer to use English rather than vernacular when conversing online, and that 90 per cent of hate comments were drawn from Facebook while twitter contributed 3 per cent. Further, and as suggested by Susan Benesch in the same report (2013:10), there is a need to tighten the definition of hate speech in order to come up with a Kenyan definition.

Conclusion

In terms of ICTs, the Kenyan election of March 2013 was the scene of some impressive technological innovations, as well as some spectacular technological failures. Furthermore, human behavior on technology was seen to be malleable, but not completely so over the long run.

Uchaguzi was a new technology used by civil society during the Kenyan Elections of 2013 designed to monitor voting problems. In terms of Uchaguzi, some of the notable achievements of Uchaguzi were that the platform ran without going down during the entire deployment, it had buy-in from a number of partners, and it received reports from geographical regions previously unrepresented on such a crowd sourcing platform (e.g., Northern town of Mandera). Some weaknesses of the platform are that it received a limited number of reports. However, this technology represents a significant contribution by Kenyan civil society to ensure the viability of Kenyan, and African elections.

Did ICTs improve the quality of the 2013 election? A more careful statement would be to say that the election represented an improvement over previous Kenyan elections in many ways, although there are significant improvements

still needed in the electoral statement. The use of ICTs was mixed in terms of improving the election. First, the Kenyan State deployed ICTs broadly in this election, yet there were many technical and human errors in that deployment, and in the end, old manual systems were used. Civil society cleverly deployed ICTs in the Kenyan election, in the form of both *Umati*, and *Uchaguzi* to track hate speech, and increase transparency in electoral behavior.

Since 2010, the Kenyan Judiciary has improved and civil society and international observers such as the Carter Centre were invited to observe the 2013 elections. In essence, although we have seen a failure in information technology, when viewed over a timeline spanning from 1992 to the present, the country's ability to hold credible elections has improved. *Techne*—the root of the word technology—means craft or art. As used by the ancient Greeks, *techne* meant the knowledge required to get the job done.

To the extent that Kenyan institutions have developed the knowledge needed to run a successful election, they are, themselves, a form of political technology, although the ICTs used by the IEBC experienced disappointing failures. To a large extent, efforts by the Government of Kenya to reduce “hate speech” curbed political speech in the short term. The GoK's three-pronged effort to regulate, censor, and educate caused people to restrain their behaviour, at least through election day.²¹ Indeed, as soon as the election was completely decided, communication on social media spiked in disturbing ways suggesting that the government's efforts were a stop-gap measure, which restrained communication during the immediate period of the election, without changing the underlying communication dynamic. Interestingly, and unfortunately, during the election itself, voter intimidation did occur.

Much of the social media tension and hate speech was witnessed when presidential hopeful Raila Odinga challenged President's Uhuru Kenyatta's victory.²² Odinga's petition saw an online battle between their supporters with many citizens also making pointed attacks at the IEBC. During the petition period CORD and Jubilee supporters started attacking each other online on Facebook, in particular. Although hate speech was suppressed the week of the election, it started up again, and escalated after the Supreme Court announced its decision.

The Kenyan Constitution (2010) has strong guarantees of freedom of expression, and freedom of the media. However, they are not absolute. Because the Constitution is relatively recent, the courts have not had time to interpret the

meaning of “hate speech.” Nor have the courts had time to determine where freedom of expression ends, and where hate speech begins. These questions remain largely open, and the Kenyan 2013 elections represented a testing ground where the government could attempt to push the interpretation in its favour. Civil society should be alert to this gap, and make a point to be engaged in the struggle to determine the meaning of hate speech in the Kenyan Constitution.

Texts and Facebook messages sent the day of the election can be assembled into different types of communication. One kind of communication aims to mobilise the voter to ensure that he or she has voted. Another kind of text aims to direct the voter towards voting for a specific candidate, or indeed, to not vote for a certain candidate. As was the case with Facebook, “peace speech” was frequently expressed via SMS. Unfortunately, despite government regulations and omnipresent media warnings to the contrary, some texts were intimidating people away from the polls, or sending politically incendiary messages. Much of the speech sent over text fell in between “hate speech,” and “peace speech” and could be simply categorised as political speech.

ICTs are not a panacea. Technology, without the people who use them, is only so many wires and cables (Scott & Marx). Information technologies can be used for good, and for ill. There is nothing intrinsic in their nature that makes them pro-democratic or pro-repression. Regulating speech over ICTs should be done with the same care as used when regulated communication over traditional media. As our article shows, ICTs were used for everything from counting votes, to spreading messages of peace, to monitoring election results, to sending information to friends, family and even enemies. The use of ICTs in African elections is a key area of study, and one that deserves more insistent and sustained inquiry.

Notes

1 The data is well-stratified by urban, peri-urban and rural observations. It is well-stratified by age, and has an almost perfect 50:50 gender balance. Observations were made in 10 counties: Nairobi, Nakuru, Muranga, Kiambu, Kajiado, Nyeri, Garissa, Mombasa, Uasin Gishu, and Embu, comprising 33 constituencies.

The outputs allowed us to collect both descriptive statistics, as well as qualitative feedback. The data revealed interesting qualitative findings, and demonstrated variation across some key cross-cutting social cleavages, such as age, gender, and rural vs. urban location.

2 Iran and China are particularly restrictive with respect to internet use. Ethiopia and the Ivory Coast filter websites. During the "Arab Spring", Egypt cut its citizens off from the internet, with similar blockades taking place in Burma, Nepal, and China. In addition to Egypt, Libya and Syria shut down the internet and cellular telephony to suppress rebellion from 2011 to 2013.

3 Pflanz, Mike. 2013. "In Kenya, Social Media Hate Speech Rises as Nation Awaits Election Ruling." *Yahoo! News*. March 21. <http://news.yahoo.com/kenya-social-media-hate-speech-rises-nation-awaits-180439909.html>.

4 Howard and Parks (2012) define social media to consist of (a) the information infrastructure and tools used to produce and distribute content that has individual value but reflects shared values; (b) the content that takes the digital form of personal messages, news, ideas, that becomes cultural products; and (c) the people, organizations, and industries that produce and consume both the tools and the content. "Facebook" or "YouTube" are examples of popular social media. Information and Communications Technologies (ICTs) can include old media, such as newspapers, radio and television, as well as newer electronic media, such as the Internet, and text messages ("SMS").

5 Quarterly Sector Statistics Report <http://www.ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q2%202013-14.pdf>

6 Armed as Kenya vote nears. <http://edition.cnn.com/video/?/video/international/2013/02/28/elbagir-kenya-armed.cnn>

7 Legal Notice No. 1, The Kenya Communications and Information Act, (Cap. 411A), Under Section 27 of the KCIA. http://www.cck.go.ke/regulations/downloads/Registration_of_Subscribers_of_Telecommunication_Services_Regulations.pdf

8 *The Star*. Kenya: CCK Defends Plan to Monitor Private Emails. By Winfred Kagwe, May 17, 2012

9 CCK sparks row with fresh bid to spy on Internet Users, *Business Daily, The Standard*, March 20, 2012.

10 <https://citizenlab.org/2013/01/planet-blue-coat-mapping-global-censorship-and-surveillance-tools/>

11 The NCIC Act. <http://www.cohesion.or.ke/images/downloads/national%20cohesion%20and%20integration%20act%202008.pdf>

12 (http://www.cck.go.ke/resc/downloads/Sector_statistics_for_Quarter_2_-_2012-2013.pdf (pg 21).

See also ("Kenya ICT Board launches Julisha ICT Survey report 2013"

<http://www.humanipo.com/news/4084/Kenya-ICT-Board-launches-Julisha-ICT-Survey-report-2013>)

13 Mobile phone subscribers in Kenya stood at over 30 million, with a 78 percent penetration rate (http://www.cck.go.ke/mobile/news/index.html?nws=/news/2013/Mobile_penetration.html

14 Report of the Experts' Meeting on 'Addressing the Challenge of Hate Crimes on the Internet in Kenya. 2013, Centre for Human Rights and Policy Studies (CHRIPS) And Centre for Human Rights and Peace (University of Nairobi) pg 5.

15 Social media become Kenya's new battleground <http://www.dw.de/social-media-become-kenyas-new-battleground/a-16687870>

16 Fred Mukinda, "14 bloggers linked to hate messages," *Daily Nation*, March 28, 2013, <http://www.nation.co.ke/News/14-bloggers-linked-to-hate-messages/-/1056/1732288/-/cut5kvz/-/index.html>.

17 "Report of the Experts' Meeting on 'Addressing the Challenge of Hate Crimes on the Internet in Kenya,'" (2013) Centre for Human Rights and Policy Studies (CHRIPS) And Centre for Human Rights and Peace (University of Nairobi), pg 4.

18 Uchaguzi is a technology-based system that enables citizens to report and keep an eye on election-related events on the ground (www.uchaguzi.com)

19 International Telecommunication Union, "Percentage of Individuals Using the Internet, 2000–2013," <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>.

20 David Souter and Monica Kerretts-Makau, "Internet Governance in Kenya—An Assessment for the Internet Society," ICT Development Associates Ltd, September 2012, pp. 28.

21 After election day, Kenyan social media famously devolved into politically and ethnically fueled viciousness.

22 Social media become Kenya's new battleground <http://www.dw.de/social-media-become-kenyas-new-battleground/a-16687870>

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Tyranny Beyond Numbers: Political Ecologies that Influence Elections

GEORGE OMONDI

Introduction

The declining quality of elections in Kenya and other parts of Africa is not new. It has been happening over time, with identifiable critical moments in political history. The problem is the increasing predictability of electoral outcomes on the basis of socio-political positions rather than political support of power contestants. A national ruling elite with a perpetual hold on state power in Kenya is settling after years of continuous establishment since independence. The present configuration of political power is the best illustration that something is static about our political processes, especially the recruitment and renewal of political leadership. The current political competition between President Uhuru Kenyatta and opposition leader Raila Odinga is a stark re-play of the political relations of their fathers in the 1960s and the 1970s. Jaramogi Oginga Odinga was Jomo Kenyatta's fiercest critic and leader of the opposition (formal and informal at different times) against Kenyatta's presidency. President Kenyatta detained Odinga after the two exchanged bitter words following an ugly incident in Kisumu in which residents rioted leaving at least 11 people dead at a presidential function presided over by President Kenyatta and attended by Odinga on October 25, 1969. Earlier, Odinga had resigned from his position as Vice-President and left KANU in 1966 to form Kenya Peoples' Union (KPU). Only three days after the Kisumu incident, KPU was banned and Kenya became a *de facto* one party state.

Still on individual and group identities, Kenya's presidents since independence have come from only two of the country's at least 42 ethnic communities—the Kikuyu and the Kalenjin.¹ They are: Jomo Kenyatta, Mwai Kibaki and Uhuru Kenyatta (Kikuyu) and Daniel Arap Moi (Kalenjin). Before enactment of the current Constitution, the president appointed and sacked the vice-president anytime he wanted. But still, Kenya's vice-presidents in history have been, by and large, from the five largest ethnic communities of Kikuyu, Luhya, Luo, Kalenjin and Kamba.² Already, ethnic exclusion stands out as a historical feature of our political system. It is difficult to obtain information on the wealth of the past and present presidents and their deputies/vice presidents, but reliable estimations based on public knowledge of their assets and properties places them among the richest individuals in the country. For a good number of them, their socio-political privileged status meshes with economic fortunes emanating from political positions they have held or positions held by their parents or close relations in past governments. Political power in Kenya has historically been retained within the circles of wealthy families and mainly from Kenya's five largest ethnic groups. However, this is changing for the worse. A mixture of old political (and economic) ties, ethnic identities and shared selfish agendas is throwing up political permutations that could further reduce the significance of elections and electors' choices in determining national political leadership. This leads us to ask two questions: first, to what extent has Kenyan electoral processes exhibited the principle of 'certainty about rules and uncertainty about outcomes'? And secondly what are some of the socio-political institutions that have promoted or hindered this principle in the Kenyan context?

Some theoretical debates

Democracy is a contested term, but one feature of 'democratic' societies widely accepted among scholars and across societies is the opportunity for citizens to choose their leaders, from time to time, and control the leaders through participatory decision-making processes. Liberal democracy is about political choices in the context of competition, as well as individual and collective rights and freedoms (Diamond, Linz & Lipset 1989; Sorensen 1993 in Adejumobi 2000). In Africa, this practice is not very old. Nigeria one of Africa's largest and economically stronger countries—held her first elections only in 1922, for the Lagos Legislative Council. The debate as to whether democratic forms of governance are best suitable for the political circumstances of Africa ought to have been

settled by now. Without resuscitating it, one popular summary holds that Africa is condemned to democracy because experiments with authoritarian regimes have not delivered development but state failure and deeper poverty.³ Perhaps a more relevant question is whether or not 'liberal democracy' is cut to Africa's size in its twin elements of elections and individual and collective rights and freedoms. A vigorous debate is going on about the extent of individual rights and liberties in Africa, framed in the context of cultural influences from western countries. It is not in our objectives to delve into this debate.

There are two important intellectual strands often recalled into debates about elections in Africa in present days. Marxist analysis views elections as a system for the perpetuation of the hegemony of the dominant classes while elite theories of democracy proclaim the existence of oligarchies in every society within which power is retained despite leadership succession. But even Marx agrees that the institutions of liberal democracy, including elections and curtailment of arbitrary state power are still important for the emancipation of the people from domination. It appears Kenya is stuck with a ruling oligarchy that blunts the edges of electoral processes for leadership change and political transition, despite the regular elections held every five years. Ordinarily, such an oligarchy would only be able to manipulate voters to attain numbers to win elections. But in Kenya, they have established themselves so strongly, and will not lose power to 'outsiders', even if the count votes were to go against them. That is why the 'tyranny' goes beyond numbers. Vote rigging is carried out by a section of society that is well placed to rig elections, by their hold on to state institutions and other social and economic instruments of manipulation and cover-up. In a polarised society such as Kenya, tyranny of numbers portends continuous isolation of large sections of the society from political power by a minimalist ethnic coalition, which may be configured in various combinations from one election to another, but still exclusive in nature. But tyranny beyond numbers is a deeper sense of exclusion in perpetual rule by oligarchs. Most of what we consider electoral malpractices are the elements of a political ecology produced and repeated each electoral cycle to retain power by the oligarchs. The problem goes beyond ethnic exclusion. It is compounded by the existence of a socio-political elite with a firm grip of politics and economy at local and national levels.

Tyranny beyond numbers: Political ecologies in recent history

The KANU years' political ecologies

Elections management bodies in Africa have been fairly well studied in recent years, especially as political competition under multipartyism led to fiercely contested polls in most parts of the continent. In Kenya, the performance and perceptions of fairness (and bias) of the Independent Electoral and Boundaries Commission (IEBC) and its predecessors the Interim Independent Electoral and Boundaries Commission (IIEBC) and the Electoral Commission of Kenya (ECK) are still debated in academic and activist circles. In recent days, discussions have also illuminated the judicial processes for elections dispute settlement through presidential elections petitioning at the Supreme Court. These are parts of what have come to be known as the 'ecology of elections' (Adejumobi 2000). Other elements in that ecology include the media and the political rights, liberties and freedoms of individuals and groups. Some authors, talking about 'pre-election variables' have considered the poverty and misery in most parts of Africa, carried over from one election to the next, as a key element of the context in which political competition occurs (Ake 1995; Adejumobi 1996; Mamdani 1987 in Adejumobi 2000). Clearly, many political and socio-economic factors have combined in multiple ways to characterise the environment in which elections have occurred in Kenya since the first multi-party polls in 1992. Only some of these factors are discussed in this chapter. In the first place, do electoral processes in Kenya reflect Adam Przeworski's notion of 'organised uncertainty'? (Przeworski 1991 in Shaheen 2002).

There cannot be much debate over this question. Kenya, like many African countries, has only managed semi-competitive or highly controlled elections in which certain players have privileged opportunities to shape rules to pre-determine elections outcomes (Shaheen 2002). This chapter is mainly concerned with the underlying causes of the uneven playing field of electoral contests that tends to confer early advantages to some contenders, usually those at the heart of state power at election times. In essence, we attempt to find explanations for the political ecology of elections in Kenya since 1992. The period 1992–2002 was the height of KANU's power, exercised against tangible opposition by new political parties. Prior to this period, dissent against KANU's excesses was brewed within civil society and the academia. In the post-1992 period, political strategies of the ruling party primarily focused on reducing the political room avail-

able to forces against KANU by placing constraints to the activities of individuals and political groupings in the opposition as well as pro-democracy civil society organisations. Opposition rallies were broken up, leaders detained and a lot of state aggression directed at civil society organisations. In both the first and second multi-party elections of 1992 and 1997 respectively, the ruling party employed underhand methods to divide the opposition, causing the split of the Forum for the Restoration of Democracy (FORD) into FORD-Kenya and FORD-Asili in 1992.⁴ More importantly, KANU's manipulation of ethnic schisms led to disenfranchisement of many voters in the Rift Valley, especially those from the Kikuyu community, but also Luos, Luhyas and Kisiis. Inter-tribal fighting, instigated and funded by KANU kingpins in the region, in which the Kikuyu in the Rift Valley were targeted in person and property, were intended to intimidate these voters who undoubtedly supported the opposition (Brown 2001). When the opposition and civil society groups rallied behind the call 'no reforms no elections', international donors gave an unexpected boost to President Moi's intransigence for electoral reforms by persuading the pro-reform crusaders to accept the Inter-Parties Parliamentary Group (IPPG) and its minimalist electoral reforms before the 1997 elections (*ibid.*).

The aborted transition and post-KANU political ecologies

Kenneth Matiba's presidential election petition over the 1992 elections was based on the violence and intimidation of voters in the Rift Valley alongside other electoral irregularities. It also argued that Moi had served two presidential terms and was not eligible to contest the presidency in the 1992 elections. But the courts exploited diversionary technicalities to dismiss the petition, like the failure by Matiba to sign the petition papers personally. The same game of technicalities played out with the presidential election petition of Mwai Kibaki against the election of Moi as president in 1997. In this case, the courts faulted Kibaki for having been unable to effect personal service of court papers to President Moi. To many observers and analysts and the Kenyan people, the 2002 elections marked a significant milestone in the country's transition to democracy. The authoritarian regime of KANU finally left power after 38 years. A lot more could be said on whether or not the election of NARC was tangible progress in the transition process or not. Throup (2003) speculates that KANU may have given in to an overwhelming national mood against the party's continued rule in

2002. And there are credible pointers to the possibility of surrender by KANU, including the lesser financial investment by the party in the electioneering of 2002 compared to 1992 and 1997.⁵

Until the referendum of 2005 on a new draft constitution, the NARC government showed commitment to political and economic change in ways Kenyans had not seen in a long time. The Economic Recovery Strategy for Wealth and Employment Creation, 2003–2007 developed by the Ministry of Planning and National Development, was the government development blueprint, outlining socio-economic and governance reforms on which the coalition's leadership and cadres had reached a unifying consensus. On the surface, Kenya had taken off towards long-term positive changes in the national economy and politics. Even the disagreements between coalition partners in the early years of the NARC coalition did not shake the popular views that the country had reached a turning point in history.⁶ However, the political contest over the 2005 draft Constitution split Raila Odinga and President Kibaki sides of the coalition into two different sides of the plebiscite. President Kibaki led proponents of the draft Constitution while Raila Odinga led those opposed to it. After President Kibaki's side lost the referendum, he re-organised his cabinet, leaving out Raila Odinga and six other ministers who had opposed the draft Constitution. Other than Raila Odinga, other members of the 'Orange Seven' sacked from the cabinet were: Najib Balala, Ochillo Ayako, Anyang' Nyong'o, William Ntimama, Kalonzo Musyoka and Lina Kilimo. This was another landmark in Kenya's political transition and a setback for the progress represented by the 2002 elections and the national mood of optimism that had followed. The country was back to adversarial politics that would definitely raise stakes in subsequent elections and increase possibilities of electoral malpractices to retain or win power at all costs.

By the time of the 2007 general elections, political schisms had run so deep and the bubble of fragile peace burst. The story of the 2007–08 post-election violence has been told in various accounts, from different perspectives and will not detain us here. Of course the biggest political import of that crisis was the International Criminal Court (ICC) indictments of Uhuru Kenyatta, William Ruto and four others on charges of crimes against humanity, on 8th March 2011. Despite the broad support for the 2010 draft Constitution and the political rapprochement between Kibaki and Odinga in their joint support for that draft Constitution, a tense environment was building up towards the 2013 general

elections. When the ICC confirmed the charges against Uhuru Kenyatta and William Ruto on 23rd January 2012, it was clear the ICC had become the strongest of the pre-2013 presidential election variables. A new political ecology began to build towards the elections. There was a bottom line. Uhuru and Ruto could only face the impending ICC trial at the helm of the state, not as ordinary citizens. For the Jubilee Alliance bringing together The National Alliance (TNA) and the United Republican Party (URP) of Uhuru and Ruto respectively, the election had to be won at all costs.

In its simplest interpretation ‘the tyranny of numbers’⁷ refers to a pooling of ethnic support bases, in voter population, for a minimalist coalition to attain the constitutional threshold for first round victory in presidential elections. But there could be a deeper meaning to this, which is the pooling of all political resources from communities in the alliance for purposes of winning the election. To be sure, Jubilee did not just bring together the voting populations in Kikuyu and Kalenjin communities. The political resources within the two communities, especially financial wealth, were pooled for a make or break run at the elections. The opposition CORD was no different. It was all in the media. For both sides, fundraising events reflected a census of wealthy individuals and families from ethnic communities aligned to the political blocs. These are some of the other tyrannies beyond voter population that are linked to the socio-cultural context of political power in Kenya.

The socio-cultural context of power: Political oligarchies in Kenya

Broadly, there are two sets of rules that constitute what we now call ‘the political ecology of elections’. In the first category are rules relating to boundaries, constituencies and assembly sizes. The second set of rules are concerned with the institutional procedures for electoral governance, including the media, elections management bodies, dispute resolution processes among others (Shaheen 2002). Our conceptualisation of the political ecologies of elections in this essay is leaning towards the second set of rules, but the first set are equally important and similarly political. It is now necessary to pose the question: *How did Kenya find itself with political ecologies that render elections meaningless in leadership choice and political change?* Our suggestion is that these ecologies emanate from tyrannies in the Kenyan society that transcend the numeric domination of any single or political combination of ethnic communities.

The phenomenon is well grounded in the socio-structural context of power, which we have partly discussed in earlier sections of this essay, especially in connection to an economically privileged elite with historical connections to the state. Ethnic divisions are part of the reason this political ecology unravels and worsens. Added to that is the economic dependencies of the majority poor people on ethnic privileged elites. The rich in society exploit that position to direct communities' political choices. It is in this context that politicians and political institutions formulate their strategies for political competition. At the highest level of ethnic control are established oligarchs presiding over political lives of their communities. The tyranny of wealthy ethnic elites has persisted throughout Kenya's political history.

There have been different combinations of ethnic elites, bringing together their material wealth and power capabilities, to alternate at the helm of the country's leadership. From the *baba na mama*⁸ KANU days, Kenya's politics is hostage to the tyranny of an elite that uses the state to acquire wealth and protect that wealth. In the KANU days, President Moi relied heavily on ethnic kingpins created and fed by the KANU machinery conflated with the structures of the state. In nearly each of the former districts, there were well known personalities and/or families virtually representing KANU in their respective areas. Most of them were either regional or national party officials. They acted as the interlocutors between the party and the people. Some of the examples are: Wilson Ndolo Ayah in Nyanza, Shariff Nassir in Coastal region, Simeon Nyachae in Kisii, and Mulu Mutisya in Ukambani region. This axis of leaders saw no evil in KANU's excesses and fiercely fought opposition forces nationally and in the regions. Although central Kenya was largely an opposition zone until the last years of KANU rule, there were still strong KANU supporters in the region, such as Joseph Kamotho.

As Moi approached the last year in office, the nature of Kenya's political oligarchy became even clearer. He (Moi) made public his preferred team of successors comprising Uhuru Kenyatta as President and Musalia Mudavadi as Vice-President. Indeed, Mudavadi was appointed Vice-President in the last three months of Moi's final term, presumably to maintain the position after elections. The plan failed and Mwai Kibaki of the opposition coalition National Rainbow Coalition (NARC) was elected President, with Michael Kijana Wamalwa as Vice-President in 2002. The results of this election further demon-

strate that Kenya's political oligarchy is spread beyond the ruling party at any one time. Mwai Kibaki, taking over power on an opposition party, had been Moi's Vice-President for 10 years from 1978 to 1988. He had also held influential cabinet dockets of Finance, Health and Home Affairs under both President Kenyatta and President Moi in the 1970s through to the 1990s. Michael Kijana Wamalwa was the son of William Wamalwa, an influential senator who died in 1976. When Michael Wamalwa died in 2003, he was replaced by Moody Awori, another name among Kenya's wealthiest and influential families. Kalonzo Musyoka, leader of ODM-K, was appointed Vice-President after the highly contested 2007 general elections and the violence that followed in 2008. Musyoka, had been a KANU insider prior to 2002, having held top positions in the party and government since the late 1980s.

Clearly, the 'big five' tribes (Kikuyu, Luhya, Kalenjin, Luo and Kamba) have dominated political power. In terms of the presidency, only two communities—the Kalenjin and the Kikuyu—have produced all of the four presidents since independence. At the moment, the president and his deputy are from Kikuyu and Kalenjin ethnic communities respectively. Some refer to the current presidency as 'Kenyatta II'. The Jubilee government carries with it continuation and new developments into the life of political oligarchies in Kenya. The Constitution of Kenya (2010) brought to an end the appointment of cabinet ministers from among Members of Parliament (MPs). Cabinet Secretaries, taking the place of ministers in the old Constitution, are appointed from outside parliament. It should have tamed the continued participation of politicians in the executive. However, politicians Charity Ngilu, Najib Balala and Kazungu Kambi were appointed cabinet secretaries. They were principal shareholders in the alliance and could not be kept away from the nucleus of power. It appears the political oligarchy in Kenya is expanding with time and taking a definite shape.

Political transitions have taken many steps forward in most parts of the continent, especially in instituting multi-party politics, but these developments have thrown up new challenges. Is there a possibility, in the Kenyan case, that the interests to preserve wealth by individuals and families with the longest historical access to the state could block further political change? The oligarchy is self-perpetuating, by inheritance and the rise of new members from the socio-political proximities of the established oligarchs. It is unclear whether total outsiders may gain entry into the oligarchy. Wealth accumulation is the first step

towards access but it does not guarantee full acceptance into the ruling club. As it is, Deputy President William Ruto seems not to have fully settled in the elite group, despite massive wealth. The court cases he is battling and the political moves to isolate him, both from within the ruling alliance and the opposition, undermine the stability of his stay among the established rulers of the land. Nonetheless, the question remains whether the country's political history has produced 'owners of the Kenyan state' who will rule over the 'others' for years to come.

Which way out?

In many ways, the post-independent African state was concerned with the delivery of 'development' to the people, as the 'fruits' of independence. In fact, even the resistances against single-party dictatorships were propelled more by the people's miseries and deepening poverty despite independence than a distinctively unique interest in democracy. The 'lost decades' of development was also the time of heightened pressure for political pluralism across the continent. It is now time that Kenyan scholars and activists shifted debate from the development goals of the state to processes of governance in which the state is a shared heritage of the people. Governance reforms and constitutional development now need to be hinged upon social objectives beyond the economic objectives of achieving 'development' or 'sharing the national cake'.

The sense of belonging to a nation and identifying with the state is one that will require more governance reforms beyond the recent achievements in reducing presidential powers, devolved governance, judicial and legislative independence as well as individual and collective rights. Yet there is no need to re-invent the wheel. The Constitution of Kenya (2010) provides the basis for the struggles envisaged here. In particular, the sovereignty of the people, human and people's rights (including economic and social rights) and leadership and ethics provisions in the Constitution will need to be translated into a new socio-structural context of power. The ingenuity of civil society and academic communities will be required to process these provisions of the supreme law into a social and political structure that assigns power to citizens and affords leadership opportunities only to those deserving it in the country. Political and social life has to flow from these sections of the Constitution, defining a new context for leadership recruitment and political competition in the country.

There are many proposals for inclusive politics in Kenya, varying from sophisticated models of proportional representation to rudimentary ideas like rotational presidency. Suggestions have also been mooted for the constitution of cabinet by all political parties that attain a certain threshold of votes. Devolution is one of the ways to manage political polarization, but it may have the effect of de-emphasizing communities' stakes in the national government instead of strengthening such stakes. It is difficult to see how a rotational presidency could work in Kenya. The country is not divided into two or three political blocs. Rotating the presidency between ethnic communities will not address political anxieties in those communities, since there are at least 42 ethnic communities in Kenya and the waiting time for some will be a century and more. Both Moi and Kibaki, at certain points in their reigns, established Governments of National Unity (GNU) that brought on board nearly all political parties in the country at the time. The objective in all instances was to stabilize the country by removing the poisoned fangs of grievances of communities erstwhile excluded from power. Ideas for the establishment of GNUs based on proportionate party support base draw from these experiences. Whichever options emerge, proportionality will be the bane of major governance reforms to undermine the strength of political oligarchs in the country.

Conclusion

The essay has re-affirmed the importance of elections as mechanisms for leadership recruitment in modern democracies, including countries with varied historical experiences in political transition such as Kenya. But the point has also been made that elections do not take place in a social and/or political vacuum. Granted, there are rules that govern electoral processes, which in themselves constitute the proximate context of elections. However, these rules flow from deeper social and political structures in societies. In Kenya, the existence of an economic and social elite strongly linked to the political era of KANU and sharp ethnic divisions are key features of the socio-political structures in which elections have been conducted since the return of political pluralism in 1992. Over time, different ecologies have emerged, but all linked to the tyrannies of the emerging 'owners of the Kenyan state'.

The most troubling tyrannies therefore is not numbers from ethnic combinations, but entrenched ethnic wealth holders intent to retain state power to protect current wealth and acquire more, in a vicious cycle of accumulation and protection of wealth through the state. Even more unsettling is the possibility of a new static ethnic elite at the helm of the Kenyan state, unwilling to let go. Political leaders will not champion necessary change. It is now incumbent upon academic and civil society leadership to push an interpretation of sections of the Constitution of Kenya to signify a new social and political structure for leadership development and political competition. It will require a shift from the 'developmentalist' objectives of the state towards a new quest for 'belonging'. The tools are already present in the Constitution, but their realisation will be an agenda of a socio-political struggle that cannot be further delayed. This chapter does not offer precise ways of achieving this, but points out quite clearly, that there is a problem, and it is not just the 'tyranny of numbers'.

Notes

1 We are aware that the definition of this group is wide and contested. But for purposes intended here, it should suffice as reference to a well known ethnic community in Kenya. Furthermore, George Saitoti, who served as Vice-President to Moi was known publicly as a Maasai but never denied claims that he was Kikuyu by birth, and only Maasai in upbringing.

2 'The big five'

3 In places like former 'Zaire' under Mobutu Sese Seko, Togo under Gnassingbe Eyadema and the Central African Republic under Jean-Bedel Bokassa, among others.

4 The obvious question is 'how did KANU divide the opposition?'. There were visits to state house by key opposition figures like Martin Shikuku, which were intended to be secretive but leaked to public. While little is known about the actual discussions between then President Moi and the opposition leaders, it is instructive that feuds in FORD leading to eventual split fermented at the same time. Some anecdotal accounts even allege the use of National Intelligence Service to create impressions of huge support for certain opposition leaders at their functions, giving them false confidence of winning the presidency and causing them to break away from united opposition.

5 Brown, 2001, estimates that KANU had spent up to US \$60 million in vote-buying alone in the 1992 elections.

6 The murmurs had to do with complaints from the Liberal Democratic Party (LDP) that Mwai Kibaki's National Alliance of Kenya (NAK) had reneged on a pre-election coalition agreement that Raila Odinga was to be appointed Prime Minister in the new government after constitutional amendments to create the position immediately after the elections. But even these complaints were submerged by leaders' own focus on the 'bigger picture' and their reluctance to rock the boat.

7 A cliché coined by a local political analyst and now widely used to describe the political strategy underlying the coming together of Uhuru and Ruto whose Kikuyu and Kalenjin communities respectively are the first and third most populous in the country.

8 Swahili for 'father and mother', as used by KANU leaders themselves to show the totalitarian rule of the independence party.

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Electoral Justice in Kenya: Resolving Disputes in a new Democratic Dispensation

J.B. OJWANG

Introduction

Although dispute settlement, following the declaration of election results, has been a matter of course since Kenya's independence in 1963, this subject has presented entirely new questions in the aftermath of the promulgation of the Constitution in August 2010. This Constitution, which marks a definite milestone in the country's progression towards constitutional governance, has not only underlined the object of fairness, and of the safeguarding of fundamental rights in all spheres of dispute settlement, but has also established new reference-points, as regards electoral justice.

The object of this chapter is, first, to consider the essence of "electoral justice," and its points of linkage to, or departure from, other spheres of dispute settlement; second, to illustrate the constitutional position as regards the conduct of elections, and the resolution of disputes arising from elections; and third, to consider recent case law, and to analyse the emerging principles of "electoral justice."

The judicial forum: Electoral justice and other categories of justice

Setting the threshold

Justice, in its simplest perception, is a quest for fairness, and for reparative relief between two "persons". Frequently, however, the claim for justice is not just in

relation to private claimants, but involves the role of a public entity which, in many cases, is perceived as benefiting from its empowered, establishment-context, to occasion the injury complained of.

Consequently, in the history of processes of justice, is that fairly well-defined rules of *private law* and of *public law* have emerged. Those of private law are particularly well settled, in the shape of concepts such as *contract*, *tort* or *property*—and the party who establishes a case of infringement by another, is generally assured of a remedy, issuing forth from the courts.

But it is not quite so plain with the domain of *public law*, in which a plurality of values and norms run in parallel—including those bearing on matters of public interest.

Of greater relevance in this regard, and in relation to public-law-type complaints, is the core thesis of this chapter: the typical public-law claim, for instance, as regards judicial review of some administrative action that falls short of the prescribed procedure, and occasions an alleged injury; or a claim of breach of a fundamental right under the Constitution—may be settled by a court on the basis of definite reference-points in law;¹ but that is not the case with *electoral grievances*.

On this account, it is proposed that one should appreciate a distinction between “electoral justice,” and “other categories of justice”. Some examples of “other categories of justice” are given.

Justice in private law

“Justice” itself is properly defined as: “[a] moral ideal that the law seeks to uphold in the protection of rights and punishment of wrong.”²

Justice is a fundamental element in the governance of relations in the private sector, the sector of “private law,” which is thus defined:

“The part of the law that deals with such aspects of relationships between individuals that are of no direct concern to the state. It includes the law of property and of trusts, family law, the law of contract, mercantile law, and the law of tort.”³

In the “private sector,” the parties in litigation are individually identified; any alleged injury to a party is ascertained with relative precision—on the basis of *evidence*; any equitable considerations emerge from the evidence; requisite recompense is shown by the evidence; and the court, applying recognised principles and rules of law, ensures justice as between the parties.⁴

Justice in public law

The party-lines may be broader in the public-law sphere, in view of the nature of this category—public law—which is thus defined:

“The part of the law that deals with the Constitution and functions of the organs of central and local government, the relationship between individuals and the state, and relationships between individuals that are of direct concern to the state. It includes constitutional law, administrative law, tax law, and criminal law.”⁵

Each of the categories thus indicated is broad enough to beckon justice at the same time for the individual litigant, and for members of the public in general; and it is arguable that justice in the public-law domain would readily incorporate justice in relation to the *electoral process*. However, there is a difference. In the several spheres of public law indicated, certain recognised principles regulate the application of the law.

For instance, constitutional law incorporates the *fundamental rights and freedoms* of the individual—with recognised modes of application. Administrative law has conventional principles applicable in *judicial review*. The application of the criminal law is defined by well-established rules. Tax law has relevant case-precedents. It is not the same with “electoral justice,” even though this, clearly, is a segment in the domain of public law.

Electoral justice

“Election,” as the foundation of the concept of “electoral justice”, is thus defined:

“The process of selecting a person to occupy an office (usu. a public office), membership, award, or other title of status....”⁶

And “general election” is thus defined:

“1. An election that occurs at a regular interval of time. Also termed *regular election*. 2. An election for all seats, as contrasted with a by-election.”⁷

From the definition, certain elements in the electoral process may be identified: (I) an individual seeks to be the holder of the public position which is the subject of election; (II) this individual has a personal interest in the occupancy of a public office; (III) the law permits this individual to offer himself or herself as a

candidate; (IV) this individual has a right to lobby for the popular vote; (V) but this right runs alongside the rights of other persons also to offer themselves as candidates; (VI) therefore, there is a *public right* and a *public interest*, in the said competition between candidates being conducted in a pacific and non-injurious manner—i.e., the competition is subject to the legal process; (VII) the members of the public have a right to representation by the candidate determined to be the most popular; (VIII) the public interest in this regard is protected by a law that outlaws frauds, violence or bribery.

The foregoing points encapsulate the *electoral law*—the foundation of which lies in the governance provisions of the *Constitution*, and the details of which are fleshed out in a *legislative statute*, and in detailed *regulations* made by the appointed electoral agency.

So substantial is the governance setting for elections, it clearly constitutes a distinct sub-category of the broad sphere of public law; it certainly is a sphere governed by special norms, and may properly be perceived as the domain of *electoral justice*.

Electoral justice confers no private, exclusive rights upon any individual, be he or she a candidate, or a constituent, or voter, or any other interested party. While persons in such categories may contest the electoral outcome, the points standing in their favour do not necessarily overshadow the rights and interests of the electorate as a whole—the *public interest*. The court, thus, is not bound to find in favour of a litigant, only because some wrong occurred in the electoral process. The court has to consider all the evidence, ascertain its gravity, and match it against the overall public interest in electoral integrity, alongside the principles of effective representation and good governance.

Electoral justice, therefore, does not fall on all fours with the conventional scheme of justice in public law, and is quite distinct from the system of justice in the sphere of private law.

It would be an apt inference that, whereas “justice” in the other segments of the legal process bears sharper delineation, in the sphere of elections it takes a more general course, distinctly fusing into broader social phenomena related to the public interest, and the popular will and expectations of the people.

This is the context in which I now proceed to consider Kenya’s recent experience in the conduct of national elections, with a focus on the role of the Judiciary.

Kenya's new constitutional order, and the framework for elections and election-dispute settlement

Public elections in Kenya's new constitutional dispensation are to be seen in the context of the Constitution's prescription of values and principles, for it is this that underlines their primacy as a designation-procedure for those with authority to hold and to move the institutions of governance, in the public interest.

Article 10 of the Constitution requires the governance-machinery to be imbued with: patriotism; devolved-power commitment; democracy and popular participation; rule of law; human dignity; equity; social justice; accountability and transparency.⁸ As all these are social values and principles that inure to all Kenyans, the arbiter of compliance cannot be one person, or a limited number of persons; it must be the *majority*. The majority, therefore, is the custodian of the right to designate those bearing the legitimacy to conduct public affairs.

Such is the background to the electoral system, which falls under "representation of the people" in Chapter Seven of the Constitution. The specific precepts to guide such representation are spelt out: freedom of citizens to exercise their political rights;⁹ universal suffrage based on the aspiration for fair representation and equality of vote;¹⁰ free and fair elections—by secret ballot; free from violence, from intimidation, from improper influence or corruption; administered in an impartial, neutral, efficient, accurate and accountable manner.¹¹ It is a guaranteed political right of every citizen to make political choices including: the right "to form, or participate in forming, a political party;"¹² "to participate in the activities of, or recruit members for, a political party;"¹³ and "to campaign for a political party or cause."¹⁴

The Constitution empowers the legislature to proceed, on the basis of the foregoing principles, to enact legislation to facilitate the conduct of democratic elections—and with reference to such matters as the determination of electoral units;¹⁵ the nomination of election candidates;¹⁶ the process of registration of voters;¹⁷ the regulation and supervision of elections.¹⁸

In view of the manifold claims of public interest in national elections, and the infinite potential for disputes arising from contestants or those allied to them, the Constitution empowers Parliament to enact statute law establishing mechanisms for the *settlement of electoral disputes*.

The primary parliamentary norm in this regard is the Elections Act, 2011,¹⁹ which aptly bears the following preamble:

“AN ACT of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; *to provide for election dispute resolution* and for connected purposes.”

For greater operational detail, and within the prescribed statutory framework, the constitutional election-management agency, namely the Independent Electoral and Boundaries Commission²⁰ has made a “statutory instrument”, the Elections (General) Regulations, 2012.²¹ While the Elections Act makes provisions for the conduct of presidential elections,²² as for parliamentary and other elections, it leaves out dispute-settlement in respect of the former. For the Constitution²³ provides that the *Supreme Court* shall have “exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President...” The relevant parliamentary enactment in this regard is the Supreme Court Act, 2011,²⁴ Section 12 of which provides, in relation to Presidential-election disputes, that—

“[an] application to the Supreme Court in respect of a [Presidential-election dispute] shall be submitted by petition and shall further comply with the *procedures prescribed by the rules*.”

Which are these “prescribed rules” for determining presidential election disputes? Article 163(8) of the Constitution provides that “[the] Supreme Court shall make rules for the exercise of its jurisdiction.” By virtue of that empowerment, the Supreme Court duly made the Supreme Court (Presidential Election Petition) Rules, 2013,²⁵ which set out the operational set-up by which this Court entertains and determines any cause lodged before it, as regards the conduct of a Presidential election.

Recent case law: Emerging principles

Context

The Supreme Court, as a new apex court bearing ultimate judgment, holds a special place which it has thus depicted:²⁶

“The Constitution’s paradigm of democratic governance entrusts to this Court the charge of assuring sanctity to its sacred principles. The Court’s mandate in respect of such principles cannot, by its inherent character, be defined in restrictive terms. Thus, such questions as come up in the course of dispute settlement (which, itself, is a constitutional phenomenon), especially those related to governance, are intrinsically issues importing the obligation to interpret or apply the Constitution—and consequently, issues falling squarely within the Supreme Court’s mandate under Article 163 (4)(a), as well as within the juridical mandate of

the Court as prescribed in Article 259(1)(c) of the Constitution, and in Section 3(c) of the Supreme Court Act, 2011...”

This is the context in which, in the aftermath of the 2013 elections, the Supreme Court made its maiden contribution in the resolution of electoral disputes. From the court’s decisions, the essence of the electoral law has been crystallised; and it is appropriate to consider the fundamental principles issuing forth from the primary instances of such decisions.

It is submitted that a clear pattern in the scheme of electoral law is already emerging; and the recent presidential election case did lay out the proper course for elections in other categories—gubernatorial and parliamentary.

The presidential election dispute

As already signalled, the first presidential election under the new Constitution proceeded in parallel with a set of other elections; and the newly-formed electoral body, the Independent Electoral and Boundaries Commission, had the task of managing a rather complex set of elections.²⁷ The elections ended with Uhuru Kenyatta being declared President, on the basis that he had received more than half of the votes cast, and besides, had received at least 25 per cent of the votes cast in more than half of the counties.

The electoral outcome promptly sparked a flurry of litigation. Three petitions were filed in the Supreme Court. The first contested the inclusion of “rejected votes” in the final tally—on the ground that such votes would have had a *distorting effect* on the percentage of votes won by each candidate. The second contested the *manner* in which the electoral process was conducted by the electoral body. The third contested the *legality* of the declaration of the third and fourth respondents as President-elect and Deputy President-elect, respectively. A generic charge also figured in the litigation: that the electoral process had been so “substantially flawed” as to vitiate the lawful status of the outcome.

In historical context, the presidential election, and the entirety of the general election, had a special place in Kenya’s political life. The promulgation of the Constitution in 2010 marked an unprecedented achievement in the nation’s democratisation initiative. The objects of the initiative, however, would remain unaccomplished, save with the first set of elections which would launch the vital institutions of governance—the Presidency; the Senate; the National Assembly; the gubernatorial offices; the County Assemblies. The elections, therefore, were

an institution-building process, upon which the course of implementation of the Constitution depended. This was the most complex political and constitutional process in the country's history, with the elective, nominative and regulatory agencies tested to the limit. In this context, it was only natural that there would be, among the people, both a celebratory mood, and apprehensions of impropriety and prejudice, in the conduct of the electoral process.

The gravamen of the three petitions may be said, as a matter of law, to raise “questions as to the validity of presidential election,” which is the subject of Article 140 of the Constitution. This Article prescribes the courses of action, and the time-lines attached to such grievances, in the following terms:

“(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.

(3) If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination.”

The importance of the Supreme Court's decision at the end of the petition is crystal-clear: it determines whether or not a swearing-in ceremony shall take place. Article 141(2)(b) provides that:

“The President-elect shall be sworn in on the first Tuesday following—

...

the seventh day following the date on which the court renders a decision declaring the election to have been valid, if any petition has been filed under Article 140.”

The general election had yet other complications. The designated electoral body was, for the first time, endeavouring to use electronic technology: biometric voter registration at the stage of registration of voters; electronic voter identification on polling day; and electronic results-transmission during vote-tallying. The regulatory body's efforts in this regard turned out to be mostly unsuccessful. Although the principal petition sought a declaration of nullity on that account, the court ruled that such was by no means a prudent course, given the general public interest in the election, and in view of the fact that manual processing was an assured option even though it be slower.

The voter-registration exercise began on 19th November, 2012, ending with the registration of some 14 million voters, for a national population of 40 million. A record 86 percent of the registered voters—with significant variations by counties and regions—turned up at the polling stations and cast their votes on 4th March, 2013. The Independent Electoral and Boundaries Commission, thereafter, set upon the task of vote-tallying, culminating in the public announcement of results. The regulatory body's chairman, on 9th March, 2013 announced the votes received by each Presidential-election candidate: Uhuru Kenyatta received 6,173,433 votes out of a total of 12,338,667 votes cast (50.07 per cent of all the votes cast); and the runner-up, Raila Odinga received 5,340,546 votes (43.31 per cent of all votes cast). On that basis, and pursuant to Article 138(4) of the Constitution, Uhuru Kenyatta was declared the President-elect (www.iebc.or.ke).

The Supreme Court directed that the three petitions be consolidated and canvassed as one. Upon consolidation, the primary cause crystallised as: whether Uhuru Kenyatta and William Ruto were validly elected and declared as President-elect and Deputy President-elect, respectively.

On the basis of the Constitution's prescribed time-frames, the matter was actively canvassed, relying upon sworn statements, and the submissions of learned counsel.

For due compliance with the Constitution's timelines, the Court, in a judicious disposition, made appropriate rulings from time to time, to facilitate timely disposal, and due compliance with the law's requirement. It was the court's perception that only by this orderly approach, could the possibility of a constitutional crisis flowing from vacuums in essential governance-functions, be averted.

Unlike the advisory-opinion matters,²⁸ with their elastic scope for interpretation of the terms of the Constitution and the construction of legal principle, the presidential election case, though so vital in the Constitution's governance scheme, and though so politically significant, is a matter falling within a well-defined framework, bounded by elements of procedure, evidence, and probability-evaluation. This is definitely a circumscribed scope for juristic creativity—and the court must adhere to such terms. Yet the outcome in such an electoral matter remains institutionally critical: for the Supreme Court sets a precedent, to guide all other courts entertaining electoral disputes.

What was the Supreme Court's finding in the Presidential-election case? The court defined its path to the crucial finding as follows:²⁹

“The evidence in the consolidated petition has been laid out in detail, and is the primary basis for disposing of the several prayers. The Court has also considered various questions of general constitutional principle, upon which the petitioners rely...As such broader foundations to the cases concerned specific prayers, and as the relevant issues were squarely canvassed by counsel, we were able to make our findings, and embody the same at various stages in the judgment.

“But, ultimately, the primary issue is the claim made by the petitioners in Petitions No.4 and 5; and these resolve into Petition No.5, namely: Must the certificate of election as President-elect issued to the [third] respondent, be cancelled; and should an order be made for a fresh Presidential election to take place in Kenya?”

The Supreme Court thus set the context in which the Presidential election, against the background of the evidence on record, should be perceived;³⁰

“An alleged breach of an electoral law, which leads to a perceived loss by a candidate, as in the Presidential election which has led to this petition, takes different considerations. The office of President is the focal point of political leadership and, therefore, a critical constitutional office. [It] is one of the main offices which, in a democratic system, are constituted strictly on the basis of majoritarian expression. The whole national population has a clear interest in the occupancy of this office which, indeed, they themselves renew from time to time, through the popular vote.”

Quite in departure from a similar American case (*Bush v. Al Gore*),³¹ in respect of which reliable account³² shows some Supreme Court judges to have had definite lines of political preference, the Kenyan Supreme Court took a different course—whether by wonted judicial inclination, design, or sheer happenstance. The Court thus spoke in unanimity,³³

“As a basic principle, it should not be for the Court to determine who comes to occupy the Presidential office; save that this Court, as the ultimate judicial forum entrusted under the Supreme Court Act, 2011...with the obligation to ‘assert the supremacy of the Constitution and the sovereignty of the people of Kenya’³⁴... must safeguard the electoral process and ensure that individuals accede to power in the Presidential office only in compliance with the law regarding elections.”

While noting that “by no means can the conduct of this election be said to have been perfect”, the court found no evidence supporting a case for orders of annulment. The court asked:

“Did the petitioner clearly and decisively show the conduct of the election to have been so devoid of merits, and so distorted as not to reflect the expression of the people’s electoral intent?”

And this was the basis of a new rule for the resolution of all categories of electoral disputes; in the court’s words:³⁵

“It is this broad test that should guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election.”

The foregoing rule, as applied by the court, led to the following determination:³⁶

“In summary, the evidence in our opinion, does not disclose any profound irregularity in the management of the electoral process, nor does it gravely impeach the mode of participation in the electoral process by any of the candidates who offered himself or herself before the voting public. It is not evident, on the facts of this case, that the candidate declared as the President-elect had not obtained the basic vote-threshold justifying his being declared as such.”

The Supreme Court thus disallowed the petition, and upheld the Presidential-election results earlier declared.

In terms of the lawyer’s norms built around the concept of law, what is the significance of Kenya’s first Presidential-election case? By its unique character, by its far-reaching political significance, and by the institution-creating moment at which it occurred, this case provided a singular opportunity for the apex court to establish a *juridical threshold*, in the consolidation of democratic governance, regulated by law. The course of the law, through the agency of the Supreme Court, has vindicated the provision of the Constitution³⁷ that: “*All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.*” The Court has recognised the principle that the people, in shaping their destiny by their own will, speak through *majoritarian expression* in elections. The Court has established the principle that the main lines of choice, as signalled in such elections, are for safeguarding, so far as possible. The Court has also laid down the principle that the arbiter, in situations of electoral dispute, should take a broad view, being guided by the consideration that the clear signals of popular intent, are not to be defeated; and only those definite, and blatant breaches of the electoral law which negate the popular will, should occasion the annulment of the electoral process.

For those seeking elective positions, in exercise of their recognised political rights,³⁸ the lesson from Kenya's first presidential election is that, pacific and lawful acts of suasion, in good time, are essential to success; and that the stage for such success rests upon certain threshold fundamentals: *large-scale voter education; effective voter registration; substantial voter turn-out in all voting areas; popularisation of intended governance agenda; proper engagement with relevant laws and institutional arrangements*. If such compliance will lead to positive electoral outcomes, it will not be for the courts to negate the popular voice.

Other categories of elections: Applying the basic principles

Consistency has been the hallmark of the Supreme Court's approach in electoral dispute-settlement. In certain segments of the Bar, the acknowledgement of the Supreme Court as the sole forum for the resolution of presidential-election disputes has run in parallel with a denial of such a status to that court, as regards *other* national elections. Such a perception arose from a rather literal notion of electoral disputes, which overlooked the more fundamental question as to the interplay between elections to key governance offices, on the one hand, and the Supreme Court's *oversight-mandate over the interpretation of the Constitution*, on the other hand.

The Supreme Court's answer to that question came in the first major electoral-dispute matter, *Gatirau Peter Munya v. Dickson Mwenda Kithinji and Two Others*,³⁹ in the following terms:

“While we agree with [learned counsel] regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must... add that the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution.”

From that foundation, the Supreme went on to resolve, on final appeal, a plurality of electoral disputes: its decisions crystallising cogent principles which, today, are to be regarded as the bedrock of *electoral law* in Kenya. A couple of examples may be given.

The Supreme Court has taken the position that it would be unrealistic to expect a perfect process in each and every election conducted—what with the

commonplace infrastructural inadequacies; the lack of effective training for election officials; the casual recruitments of basic staff; the little-assured electronic systems; etc.

So in *Gatirau Peter Munya v. Dickson Mwenda Kithinji*,⁴⁰ the Supreme Court reversed the Court of Appeal's decision which had nullified Governor Munya's election, in the following terms:⁴¹

"Having found that the election was conducted substantially in accordance with the [applicable] constitutional principles, the learned [Appellate] Judges had no basis for invalidating such an election, unless such errors and irregularities had demonstrably reversed the result against the appellant herein."

Again in the electoral dispute over the gubernatorial election for Garissa County, *Nathif Jama Adam v. Abdikhaim Osman Mohamed and Three Others*,⁴² the Supreme Court restored the petitioner to office, holding as follows:⁴³

"...the Appellate Court erred in finding that there were irregularities that affected the election-outcome, while not undertaking any analysis of the identity and import of that effect."

And yet again, in *Zachariah Okoth Obado v. Edward Akong'o Oyugi and Three Others*,⁴⁴ the Supreme Court reversed a Court of Appeal decision which had annulled the petitioner's election as Governor of Migori County. It was found that the Appellate Court had failed to take into account the principles enunciated in the earlier presidential-election case, as follows:⁴⁵

"This Court further held [in the Presidential election case] that where a party alleges non-conformity with the electoral law, it is incumbent upon that party to not only prove that there was non-compliance, but that the non-compliance affected the validity of the election."

The Supreme Court, in the *Obado*⁴⁶ case, further remarked as follows:

"...we are of the opinion, with respect, that the Appellate Court misdirected itself in failing to follow the binding precedent set by this Court in the *Raila Odinga* case, which enjoins that a Court is to consider the effect of the alleged irregularities on the election result, before nullifying an election. It is only upon a finding that the irregularities proven affected the declared election results, that a Court will nullify an election."

Conclusion

One would attribute to this book-project the conventional wisdom, as to the existence of a social purpose to our place on earth, and in this country: to put to beneficial cause nature's amenities, and to manage the human potential in such a manner as sustains and fortifies the good life for all. In that scenario, the crucial subject of interest is *governance*: the conduct of the policy and affairs of State, organisations, and people. Our interest in governance has been from the standpoint of *elections to public office*—Presidential elections, and other elections.

There has been much public interest in Kenya's first presidential election, under the new Constitution, and in other attendant elections, as well. The Supreme Court, as the ultimate arbiter in constitutional questions, had an opportunity to take a broad view of the electoral process, and was able to lay the pillars upon which a more comprehensive body of electoral law will be erected in the years to come.

No doubt, such an initiative cannot at this stage, claim perfection; but it can be said to have identified the essential building-blocks, out of which a stronger foundation of the electoral law will be erected.

Notes

- 1** C.T. Emery and B. Smythe, *Judicial Review: Legal Limits of Official Power* (London: Sweet & Maxwell, 1986); J.B. Ojwang, "Judicial Review and Constitutional Adjudication," *JTI Bulletin* (Nairobi), No. 10 (2011–2012), pp. 6–10; J.B. Ojwang, *Ascendant Judiciary in East Africa* (Nairobi: Strathmore University Press, 2013), pp. 61–72.
- 2** J. Law and E.A. Martin (eds.), *Oxford Dictionary of Law*, 7th ed. (Oxford: Oxford University Press), p.310.
- 3** *Id.*, p.424.
- 4** There are graphic examples in case law, eg: *Donoghue v. Stevenson* [1932] AC 562; *Githieya v. Gitau* [2004] 2 KLR 309; *Kamande and Two Others v. Ngucaniririo Farmers Company Ltd.*, Nairobi HCCC No. 1573 of 1995; *Kiunjuri v. Mwangi and Two Others* [2008] KLR 525; *Loise Ltd. v. Linck t/a The Lincks to Better Health*, Nairobi HCCC No. 554 of 2005.
- 5** *Oxford Dictionary of Law*, *op. cit.*, p.439.
- 6** B.A. Garner (ed.), *Black's Law Dictionary*, 8th ed. (St. Paul, MN: West Group, 2004), p.557.
- 7** *Ibid.*
- 8** Article 10(2)(a),(b),(c).
- 9** Article 81(a).
- 10** Article 81(d).
- 11** Article 81(e).
- 12** Article 38(1)(a).
- 13** Article 38(1)(b).
- 14** Article 38(1)(c).
- 15** Article 82(1)(a).
- 16** Article 82(1)(b).
- 17** Article 82(1)(c).
- 18** Article 82(1)(d).
- 19** Act No. 24 of 2011 (revised in 2012) (emphasis supplied).
- 20** Article 88.
- 21** Legal Notice No. 128/2012.
- 22** Sections 14, 15.
- 23** Article 163(3)(a).
- 24** Act No. 7 of 2011 (emphasis supplied).
- 25** Legal Notice No. 15 of 2013.
- 26** *Hon. Lemanken Aramat vs. Harun Meitamei Lempaka and Two Others*, Sup. Ct. Petition No. 5 of 2014 (para. 107).
- 27** In the run-up to these elections, questions had already arisen before the Supreme Court calling for ascertainment of pre-election situations: Sup. Ct. Application No. 2 of 2011; and Sup.Ct. Advisory Opinion No. 2 of 2011.

- 28** These are reserved to the Supreme Court under Article 163(6) of the Constitution.
- 29** Paras. 295, 296 of the judgment.
- 30** *Id.*, para. 298.
- 31** 531 U.S. 98 (2000).
- 32** Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York: Anchor Books, 2008).
- 33** Para.299 of the judgment.
- 34** The Supreme Court Act, 2011, Section 3(a).
- 35** Para.304 of the judgement.
- 36** *Id.*, para. 306.
- 37** Article 1(1).
- 38** The Constitution, Article 38.
- 39** Sup. Ct. Application No. 5 of 2014, para. 77 (ruling delivered by Ojwang and Wanjala, SC.JJ.)
- 40** Sup. Ct. Petition No. 2B of 2014.
- 41** *Id.*, para. 224.
- 42** Sup. Ct. Petition No. 13 of 2014.
- 43** *Id.*, para. 96.
- 44** Sup. Ct. Petition No. 4 of 2014.
- 45** *Id.*, para. 118.
- 46** *Id.*, para. 126.

Exclusionary practices in the Elections of March 2013 in Kenya: How Gender Issues were Negotiated by Leaders and Voters

JACQUELINE ADHIAMBO ODUOL

Introduction

Women in Kenya, like their counterparts in other African states, continue to walk what Gwendolyn Mikell (1997) calls “a political/gender tightrope”. From independence in 1963, Kenyan women have been concerned about the economic and political problems facing their communities and have grappled with how to transform societal notions of gender and family roles while affirming their own identities. The challenges women have continued to face as they seek political office range from barriers related to cultural expectations; the balance or choice between work and family; organisational culture and practice of political parties, nomination procedures, conducting political campaigns and the stress that accompanies positions of leadership as experienced differently by men and women.

“Although the post-independence government brought new possibilities for political involvement, women were not granted the same political access as men,” (Nzomo 1997 as cited in Kiamba 2008:4). In politics, women have been marginalised because men monopolise the decision-making structures and

dominate leadership positions. One underlying problem for women has been the difficulty in dealing with the inherent patriarchal structures in society, the processes of State and the party. Indeed it is reasonable to conclude that the “omission of a constitutional mechanism to give effect to the two-thirds gender principle in respect to representation in Parliament, was not an accident but a result of the compromises that had to be made to retain Articles 27 (6 & 8) and 82(b)” on the two-third gender provision (Nzomo 2012:4). These articles are categorical that “the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender” (Constitution of Kenya 2010:27). Even before the 2013 elections, it was clear that patriarchy was set to claw back the progressive and gender responsive provisions manifested through the “fierce contestations in respect to the implementation of the...gender rule contained in Articles 27 (8) and 81(b) of the Constitution.” These were politically-motivated and reflective of the wider political representation power struggles, whose gender dimension has always taken the form of consolidation and institutionalisation of patriarchal norms and the preservation of legal frameworks and policies that constrain and/or exclude women from political governance.

FIDA-Kenya’s gender audit of the 2013 General Election confirms this perspective and concludes that the two main reasons that account for women’s continued discrimination in politics are perhaps “Kenya’s patriarchal culture and its electoral system”. While acknowledging that the 2013 elections yielded the highest number of women, nominated or elected to Parliament (FIDA-Kenya 2013:86), the audit faults the result given the constitutional provisions and legal requirements set to increase women’s participation in politics. The elections suggest that the Constitution 2010 has faced the same fate as the task force for the Review of Laws Relating to Women appointed by the Attorney-General in Gazette Notice No. 4820 of October, 1993. As a member of this taskforce, I can confirm that critical gender responsive recommendations, including affirmative action that would increase the participation of women in the country’s development institutions, were not operationalised in 2002 with the transition from KANU to the National Rainbow Coalition (Mitullah 2003:219). This has not changed; even the progressive 2010 Constitution has failed to deal with the elephant of patriarchy suffocating women’s efforts to engage in political leadership.

Thus while the country is rich in gender-related policy and legislative frameworks, including the 1974–78 Development Plan, the National Food Policy (1981), the Population Policy (1984) and the National Policy on Gender and Development (2000) (cited in Mitullah 2003:216), compared to its neighbours, Tanzania and Uganda, Kenya remains the least responsive to gender issues. This is especially in the area of politics and decision-making. President Uhuru Kenyatta is the first President under the new dispensation and is the current chair of the East African Community Heads of State Summit. While Rwanda leads at 56.3 per cent of women representation in the National Assembly, followed by Tanzania at 36 per cent, Uganda at 35 per cent, and Burundi at 30.5 per cent, Kenya lags behind at 19.4 per cent. And expectations placed on affirmative action as a strategy to redress the situation has hit a snag if the Supreme Court ruling of 2012 that the two-thirds gender provision be realised progressively through established mechanisms by August 15th, 2015, and attendant lethargic attempts, is anything to go by.

The taskforce set by the Chief Justice, and chaired by the National Gender and Equality Commission (NGEC) to provide a workable formula, is riddled with the usual limitations. First are the limitations imposed by external forces. Second, limitations inherent in purpose, composition and design of the taskforce, and of critical institutions, especially the political parties, the IEBC, the Registrar of Political Parties, the Constitutional Implementation Committee (CIC), the police service, the national machineries for gender equality and women's advancement and the development partners. The verdict from the public court is that not even the UN Women, the United Nations Entity for Gender Equality and the Empowerment of Women has been spared. The last and most critical limitation is ignorance and faulty belief, not only of women themselves as candidates and as voters, but also of men, especially those who hold important decision-making positions in social, political and religious institutions.

What exclusionary practices have dominated Kenyan politics since 1963 and prevented women's access to political leadership?

The 2013 General Election was organised against a background of legislated quotas which were to be implemented through the constitutional “not more than two-thirds gender rule” and incorporated into other electoral laws, including the Political Parties Act (2011) and the Electoral Act. Yet both the

gender audit and testimonies from women candidates indicate that institutional duty bearers such as the political parties, the IEBC, the Registrar of Political Parties and the National Police Service did not ensure compliance to the Electoral Code of Conduct during the elections or exercise respective authorities sufficiently.

Political parties also applied voluntary quota rule in addition to seeking compliance with the law. Such parties included a certain percentage of women members in the list of approved candidates for election, appointed women in critical decision-making positions and reduced or waived nomination fees for women during the primary nomination elections. However, as confirmed by the gender audit, the gender ranking of political parties by the Centre for Multiparty Democracy (CMD) and women politicians, affirmative action is still a long way to actual realisation in Kenya's politics.

An important way to ignite the desired change is to motivate political parties to go beyond minimalistic compliance with gender equality principles simply to acquire registration and to demonstrate commitment to the values of equality, justice and internal party democracy for all irrespective of gender. This could be achieved by supporting development along four parameters: demonstrated political will to gender equality and women's political empowerment; accountability to legislative and policy requirements; organisational culture of practice and technical capacity to actualise intentions in political operations. These four aspects are useful because they provide good entry points to identify practical steps that can be taken by key actors, political parties, IEBC, the police service, development partners and women's organisations to promote respect for women's political rights.

The four parameters further provide insight on the extent to which legislative and policy frameworks can promote the creation of more space for women's participation through effective strategies especially gender quotas and responsive electoral systems that integrate women's concerns. The parameters show why women continue to struggle in politics, particularly in political parties, the main gateway into politics. Political parties continue to provide a challenge since women are unable to get access to the party structures, understand how the party works and position themselves appropriately. It is further complicated when coalition-building is added to the equation as happened in 2013. To move forward, there is "need to strengthen political party democracy mechanism in order to open space for women's participation. Committed actors, including

women leaders, have to think outside the box and come up with programmes that will strengthen women at both the national and the county levels” (Alice Wahome MP, Kandara, FIDA-Kenya, 2013).

Exclusionary practices in politics in Kenya can be examined from three perspectives: institutional, systemic and individual. They include external barriers such as institutional policies and practices of election to internal barriers that arise from women’s perspective, motivation, skills and leadership identity.

Individual and systemic barriers include inequality due to the perception of motherhood and fatherhood and the role of a woman and a man in the family in politics. The circumstances of work, often in largely male company, long and late hours of engagement particularly during campaign period, present a real challenge. Women’s personal experience of discrimination in politics, perceived to be masculine, affects their confidence and the much needed leadership presence.

Women’s political participation is not “allowed” due to the existence of men’s solidarity networks and interest groups. Thus women are disadvantaged in a political environment defined by male characteristics such as decisiveness, aggressiveness and intransigence. Since women are perceived to be sensitive, understanding, prudent, pragmatic, conscientious, reliable and responsible with ability to empathise, they have to exert “twice as much effort” as men to push forward their opinions. Usually women have to adapt their behaviour to a given situation, sometimes having to learn “masculine models of behaviour.” In some cases women have used this expectation strategically by emphasising advantages of “a feminine style of behaviour” in a masculine environment (Enlargement, Gender and Governance (EGG) EU Framework 5, Project No HPSE-CT-2002-00115).

Institutional barriers stem from the implementation of proportional electoral system that is contingent upon how many seats each party wins. The challenge emanates from the lack of willingness of political parties to nominate women to winnable positions in party strongholds. Although small parties tend to nominate more women, few are elected partly because the parties include women as candidates more as an exercise of marketing and public relations and not with strategic intent to win elections. As a result, there are more women on political party lists in smaller political parties than in stronger parliamentary parties, which have presence in Parliament. But this does not help the cause for women

since that the nomination process which could offer opportunity for the political parties to include women is guided by the number of seats a party wins in elections. When the smaller political parties fail to win elections, women's names do not go beyond the party list.

A gender ranking by CMD (2014) confirmed that most political parties carry gender quotas in policy documents and manifestoes without corresponding concrete actions. Thus women mainly occupy the women's wing positions in wider leadership of all parliamentary political parties, regardless of political parties and electoral laws. Some political parties have realised the lack of women in their ranks and have established women's party groups or introduced intra-party quotas for party bodies. However, civic activities aimed at supporting the political participation of women is not sufficiently strategic and is yet to increase the electoral turnout of women, and raise the visibility of women active in politics or those running for different seats.

From women to gender and the challenge of women's only seats in the March 2013 elections

A major contributing factor to the exclusion of women during the 2013 elections was the way the dominant perspectives on Kenyan politics conspired with those about "women" to limit women's election. In recognition of the deep-rooted values that inhibit women's participation in elective politics, the Constitution (2010) has made provision for women's only (special) seats in Parliament (Article 97b). Thus the introduction of Women Representative seats is designed to increase the number of women in the National Assembly to compliment the women elected through the 290 constituencies. In the 2013 elections, 47 Women Representatives were elected, with each of the 47 counties constituting a single member constituency.

Yet anecdotal evidence shows that the special seats were used to discourage women from running in dual gender constituencies. At the same time, women chose to contest for the Women Representative position to avoid the hostile and aggressive terrain of male-dominated election campaigning. In this regard the experiences with the Women Representative positions constitute an important indicator of the exclusionary practices women faced during the elections. As a strategy the Women Representative seats reinforced individual and systemic barriers arising from the way women and men think about "women" and about political participation and representation in Kenya.

This is especially important given the current practice where there is a focus on gender as a critical concept that is used to help actors sort out the complex realities of women's political participation and to develop strategies of engagement. Yet individual and collective women's organising strategies and interventions are increasingly adapting a stance that is uncomfortable with challenging the concept of gender-as-power, which relegates women to the realm of influence and not direct authority or power.

Therefore, priority is placed on strategic partnerships with men at the expense of the 'hard' conversation among women and with men to challenge the status quo and to coach individual women how they can build the self-belief and self-confidence required for success in political elections. This explains why despite the substantive gains enjoyed by women through the Constitution (2010), the first thought of women and men alike in 2013, mirrored the traditional value system that "women are women and men are men" which carried both conceptions of gender as difference as well as power (D'Amico Francine and Beckman R. Peter 1995). In other words, the traditional value system imagines gender as positions of difference. During the general election, there seemed to be consensus not only that women and men are different but that from a gender perspective, men have (or merit) political power while women do not.

In discussing exclusionary practices in political elections and how gender issues are negotiated, we must remember that gender can be defined in two different ways: firstly "gender-as-difference" and secondly "gender-as-power." Gender-as-difference refers to "characteristics linked to a particular sex by one's culture (while) gender-as-power sees gender as a socially-constructed relationship of inequality" (Francine & Peter 1995).

In the context of the 2013 elections, the culturally accepted differences between women and men represent a relationship of inequality where one group (men) in society generally, and in the mechanisms created to safeguard constitutional gains in particular, exercised power over the other (women). Hence, the propaganda that women are not expected to contest for election as Members of Parliament, senators or governors because they have "their seat". This leads to exclusion women in two respects: creates the perception that election to these seats is only appropriate for men and secondly by socialising women candidates and voters to accept this perception and thereby maintain the unequal power relationship. This further confirms the stereotype that polit-

ical elections in dual gender seats is the preserve of men, and that women are only expected to contest for the special seats.

“From this perspective, the very labels ‘women’ and ‘men’ reflect unequal power. To label individuals as ‘women’ or ‘men’ is to exercise power; for the label creates for human beings a set of expectations about who they are, who they are not, and what range of choice is available. The human beings carrying one label have more rights or privileges than those carrying the other label. Gender differences, thus translate into gender hierarchy” (D’Amico & Peter, 1995).

This perspective is an important aspect of exclusionary practices witnessed during the 2013 elections and the methods employed to negotiate gender issues therein. The interpretation of gender-as-power continues to impact negatively on women’s confidence, as candidates and as voters, and to undermine their desire to fight for power in political elections on an equal basis with men.

Yet the approach used to negotiate gender issues in the elections only prioritised the understanding of gender as difference taking an apologetic stance on challenging the unequal power relations. It operated on the assumption that because the Constitution specifically legislates against exclusion of women, men as individuals and as policy makers and gate-keepers of political parties are committed to enhancing women’s participation. Perhaps, the greatest challenge was over reliance on policy statements about “mainstreaming gender” in accordance with the Constitution. To dismantle prevailing exclusionary practices, all stakeholders should stop using gender mainstreaming as an end in itself, which is articulated only in policy documents and pronouncements. Instead, gender issues must be mainstreamed in real terms.

All the actors, particularly political parties and IEBC, must promote gender mainstreaming to ensure equal involvement, participation and visibility of women and men in all spheres of life. This application must reflect two major aspects: the integration of gender equality concerns in the analysis and formulation of all policies, programmes and projects and undertaking initiatives that enable women and men to formulate and express their views and participate in decision-making on all election issues on an equal basis.

When gender is socially constructed as unequal power relations, the process of mainstreaming gender—empowering women economically and in leadership—is ineffective. Specific actions are necessary to transform the woman’s sense of self-worth and self-esteem in the context of internalised beliefs and

societal norms. Such interventions must be designed to push women out of their comfort zones and to motivate them to take charge of their social wellbeing as well as their economic and political destiny. These interventions must help women overcome the good woman stereotype where women are content to be praised as nice because they do not scheme to access political power. This will challenge gender-based exclusionary practices on access to real political power and equip women with tools of self-presentation that enable them to construct authoritative identities.

And this can only happen when actions taken go beyond “simply mainstreaming women” or “women joining the polluted stream” of political party national executive committees, constitutional commissions and other critical mechanisms and arms of government at the national and county levels. Such actions must be “about cleaning the system, changing stagnant pools (of individual and collective women’s initiatives) into fresh flowing waters” (Basiri 2005). Therefore, women in the civil society and in political parties in Kenya need to challenge the prevailing practice of male privilege in the politics of elections. They must demonstrate that they reject the notion that they are willing to settle for tokenism and raw deals that maintain unequal power relations just because men are uncomfortable with disturbing the status quo.

The Kenyan model of negotiating gender issues in the elections for political leadership

The Kenyan model of negotiating gender issues in politics continues to lean heavily on legislation, laws and expert opinion and is big on training and information overload of what needs to be done but very thin on the development of leadership skills. It is uni-directional, uni-dimensional and assumes a one-size fits all approach where certain systems, processes and techniques are considered to be the right way. It assumes that once inclusion of women has been legislated in the Constitution and relevant policy frameworks and expert opinion incorporated in political institutions, structures and programmes, the number of women participating in politics and being elected would increase.

Failure to implement legislative and provisions of the Constitution (2010) and Political Parties Act (2011) reinforced structural gaps that undermined women’s achievements at the elections. Only 16 women were elected out of the 290 constituencies, a drop from the 10th Parliament where 16 women were elected out of 210 constituencies. The 10th Parliament had six women nomi-

nated, while the 11th has five women nominated out of 12 slots. No woman was elected to the Senate and none was elected governor. Therefore, the 16 women who joined the Senate only did so through nomination by their political parties. At the county level, only 82 women were elected out of the 1450 direct elections to the County Assembly. Therefore, 680 women were nominated country wide to achieve gender parity in accordance with Article 177 (1b and 2) of the Constitution (FIDA-Kenya 2013).

Thus, effective negotiation of gender issues in political leadership calls for a paradigm shift, including departing from business-as-usual approach to shattering the status quo by isolating, understanding and strategically tackling the limitations identified above using behavioural and psychological constructs.

The biggest cause of women's exclusion at the 2013 elections was the poor implementation and in some instances, violation of the law, with most election organs taking a "very passive and minimalistic approach to putting in place" required measures (FIDA-Kenya 2013:10). Research shows that the electoral system matters and that the proportion of women elected through proportional representation system yields better results for women than the first-past-the-post system. Further, while gender quotas are not a necessary condition for increased women representation, the specific design of the quota system is crucial for the successful implementation of the quotas (Dahlerup 2006 cited in Dahlerup *et al.* 2008:9).

In Kenya, the electoral system requires a certain proportion of representation of either gender on candidates' lists, which means that women have (theoretically) a better chance to be elected. The position of women on the candidates' lists is then crucial for their eligibility: the higher a woman is seeded on the list, the better chance she would be elected. The First-Past-the-Post, winner-take-all voting system also does not deliver for women in Kenya. This is why Vicky Randall's definition of politics as an "articulation, or working out of relationships within an already given power structure' becomes relevant (cited in Norris *et al.* 2008).

Political parties acted as gatekeepers and determined which candidates were in the list. Women were not elected because the structures of political parties and the electoral systems created systemic barriers to their full and equal participation in leadership. Party support was central to women's entry and effective participation and leadership in the elections. Women played important roles in campaigning and mobilising support for their parties, and although the parties

had resources for conducting campaigns, not many women benefited. Many parties did not provide sufficient financial support for women candidates despite research findings “that a large pool of women candidates, combined with sufficient financial resources, can significantly increase the number of women elected” (Shvedova 2005:37).

This is because the emphasis of ‘male characteristics’ in the selection and nomination process became the criteria for selecting party candidates and reflected a bias against women. The party’s ‘old boys club’ approach also inhibited and prevented women from integrating themselves in their party’s work. Moreover political parties did not place women in winnable constituencies and wards in their strongholds.

This is demonstrated by the number of women cleared and elected in the political parties that formed the two main coalitions, Jubilee, made up of The National Alliance (TNA) and United Republic Party (URP) and the Coalition for Restoration of Democracy (CORD) made up of the Orange Democratic Movement (ODM) and Wiper Democratic Movement (WDM).

Political Party	Cleared MP* Female	Elected MP Female	Elected MP Male	Cleared CA** Female	Elected CA Female	Elected CA Male
TNA	23	10	62	11	1	350
URP	6	3	63	11	1	242
ODM	9	1	78	13	5	372
WDM	8	1	19	33	5	76

Adapted from Gender Ranking of Political Parties in Kenya, CMD-Kenya Nairobi February 28th 2014

* Member of Parliament

** County Assembly

How were gender issues negotiated by leaders and voters in the 2013 elections?

In examining the role of various election-related systems and instruments in the management of the 2013 General Election, we reflect on those that were charged with ensuring gender responsiveness and how the mandate of the various institutions was discharged. The model of gender mainstreaming and women’s empowerment for political leadership has three approaches. The first is gender sensitisation, lobbying and advocacy for gender responsive policies, institutional

arrangements, technical capacity, organisational culture and accountability at all levels. Second is the creation of an enabling policy environment through research, the formation of relevant policies, procedures and regulations and guidelines for effective implementation and lastly enacting of appropriate laws.

Analysis of global and regional trends between 1984 and 2012 (Nzomo 2012:8), show that legislation and the implementation of electoral gender quotas are the best strategies for negotiating women's increased participation in political leadership. South Africa, Rwanda, Uganda and many European countries demonstrate that the increased numbers of women elected or nominated was achieved through this model. This is why the 2010 Constitution was hailed as it sought to eliminate gender exclusion. Unfortunately the legislation and implementation of gender quotas was instituted within gender disparities that are structural and systemic without addressing these barriers.

Articles 27(8) and 81(b) of the Constitution provide for gender quality legislation through the "not more than two-thirds" gender rule and give teeth to CEDAW and other policy frameworks like the Beijing Platform for Action, the Political Parties Act 2011, the Elections Act and the Electoral Code of Conduct and political party manifestoes to tackle the exclusion of women's participation in politics. Indeed, as Kenya approached the 2013 elections, there was reason to celebrate. Systems, institutions and programmes were developed. The IEBC, Registrar of Political Parties and the parties were charged with responsibility of enforcing the gender rule. In addition, strategic training and innovative frameworks of engagement such as the UN Women Committee of Eminent Persons were organised.

Recommendations by FIDA-Kenya's Gender Audit of 2013 elections reveal the role the various election-related systems and instruments were expected to play in the management of the polls. Given the significance of political parties in the election processes and gendered restrictions at the nomination stage and during campaigns and election period, the IEBC was expected to exercise its authority to regulate and oversee all political party nominations with a gender lens. IEBC was also expected to monitor compliance with the Electoral Code of Conduct during elections and penalise violations. A strategic alliance between IEBC and the National Police Service to enforce the law and challenge acceptance of gender based election violence was expected to punch to the process. In this package, police officers would be trained on electoral offences and sensitised on the cost of gender-based violence to overall security and development.

Political parties would not qualify to register and participate in the elections unless they complied with the gender principles in the Political Parties Act. Most political parties therefore incorporated gender provisions in their constitutions, and relevant policy and regulation documents providing for women's representation in party governing bodies such as the national executive council (NEC) and key decision making positions. Political parties were then expected to ensure that all its units down to the village level applied gender parity in their composition, and took up affirmative action measures in a manner that would mobilise women to run on their party tickets. That is to “respect and uphold constitutional legislation and party rules in all party exercises including nominations, development of party lists and party membership” disputes (Omukhango 2014:5).

The Political Parties Act confers on the Registrar of political parties the power to regulate

Political parties and it was expected that the office would use this authority to ensure that party structures and processes were gender-responsive. With the vibrant policy and legislative framework, and in collaboration with the numerous stakeholders committed to the removal of practices that excluded women from politics, the registrar of political parties had an opportunity to audit political parties for non-compliance, violations of gender provisions and presentation of non-authentic list of members for compliance. Yet this was not the case. Instead intervention took the form of lobbying and advocacy largely by the traditional gender based bodies. Some of the organisations that attempted to promote the realisation of a gender responsive electoral process included the UN Women, the National Gender and Equality Commission (NGEC), bilateral agencies and other partners such as the National Democratic Institute (NDI), Centre for Multiparty Democracy (CMD), and civil society groups.

Innovative synergy, creativity and strategic partnership of this nature was expected to provide leverage for the Registrar of Political Parties to develop practical guidelines on measures that parties committed to include women's active engagement in politics and political party activities can take.

The Commission for the Implementation of the Constitution (CIC) was expected to pursue active inclusion strategies and address specific obstacles limiting women's participation in the elections by ensuring that the gender quota system applied was compatible with the electoral system. Towards this

end, it was necessary to have effective legal sanctions in place for the violation of the “not more than two thirds gender rule”. It is also necessary to combine such legislated quotas with party quotas where political parties voluntarily apply the principle when compiling their nomination lists. This approach must demand for the combination of quotas with other measures that can leverage women’s political participation. These include building women’s “political capital and political capacities (and) means of political participation such as political skills, economic resources, education, training and access to education”. Women are usually not elected in positions of power within party structures because of gender bias towards male leadership hence the value of working with political parties to adopt voluntary quotas and with other partners to tackle the structural and systemic barriers.

In others words, while Kenya has an invaluable constitutional provision for eliminating exclusionary practices, it is unlikely to realise the desired progress, as demonstrated by the results of 2013 elections, on the basis of legislation only. FIDA-Kenya captures the challenge in its conclusion of the gender audit of the elections thus, “overall FIDA found no justifiable reason for the consistent and systematic exclusion of women in politics, electoral processes and consequently, representation. It simply must stop.”

What this means is that while we can legislate against exclusion, “not more than two thirds”, we should never forget that we cannot legislate inclusion. “Laws legislate for equal opportunity. They do not and cannot legislate truly equal access to that opportunity, and most important, they cannot ensure that people who have traditionally been discriminated against will immediately and automatically demonstrate the ability to take advantage of whatever access to opportunity may exist” (Hennig & Jardin 1977:12).

The Kenyan model continues to lean too much on legislation, laws and expert opinion at the expense of identifying what is complimentary and thinking out of the box.

This is why this discussion on the implementation of the constitutional gender rule explores a paradigm shift in the basic assumptions and the conceptual frame of reference if the desired goal is to be achieved. Possible value addition could be achieved by isolating, understanding and strategically tackling three types of limitations in the spirit of leadership at play in political practice and general elections and how behavioural and psychological constructs can inform implementation of the rule.

How can the constitutional 'gender rule' be implemented more effectively?

In view of the casual attitude and controversy surrounding the application of the constitutional gender rule in political representation in Kenya, and the emerging fatigue of women, as candidates, voters and as a movement, it may be useful to learn from two theories of health behaviour change: namely, Health Belief Model (HBM) developed by social psychologists Hochbaum, Rosenstock and Kegels in the 1950s and the Stages of Change (Trans-theoretical) Model. The theories help us understand how to tackle the limitations of leadership. "First, there are limitations that are imposed by external forces. Second, there are limitations that are inherent in the purpose and design of a created entity. Yet, most important, there is limitation that is a result of ignorance and faulty belief. This is the worst type of limitation because it is self-maintained and preserved" (Munroe 2005:182). These constructs are of great relevance to the question of how to implement the gender rule. Gender audit of the 2013 elections shows that all key actors, including women voters and candidates, are at different stages of change in their readiness and willingness to deliver on or demand for the implementation of the gender rule.

Political parties, IEBC, the Registrar of Political Parties, the National Police Service, development partners, women candidates as well as male and female leaders can apply the Health Belief Model (HBM) to address respective perceptions of the threat posed by exclusion of women (susceptibility, severity), the benefits of avoiding the threat, and factors influencing the decision to act (barriers, cues to action, and self-efficacy). In this way, actors can explain and predict gender-responsive behaviors, particularly in regard to the uptake of provisions.

The four constructs of perceived severity, perceived susceptibility, perceived benefits and perceived barriers represent perceived threats and net benefits to taking a particular action. They can therefore help to account for actors "readiness to act" on recommended gender rules. Measures taken to operationalise the gender rule would reflect cues to action, activate this readiness to act and stimulate overt behaviour. In addition, respective actors, such as political parties and or women's concept of self-efficacy or confidence in their ability to successfully implement gender requirements would help them better address the challenges of changing discriminatory behaviors.

The Stages of Change (Trans-theoretical) Model describes individuals', and in this case institutional, motivation and readiness to change behaviour. Sanctions

for non-compliance can be applied depending on the stage of the election system or institution. Pre-contemplation signifies that actors are not ready and are not intending to take action in the foreseeable future. A more serious concern is that they can be unaware that their behaviour is problematic given their worldview and belief system. The next, contemplation stage shows that actors are getting ready and are beginning to recognise that their behaviour is problematic. They start looking at the cost of their continued actions to discriminate against women. Next is the preparation stage where actors are set to take action in the immediate future. They may actually begin taking small steps towards treatment of women as specified in policy and legislative frameworks. In the next stage, actors take action by making specific modifications in their problem (discriminatory) behaviour or by acquiring new gender responsive behaviours. Systematic monitoring and evaluation can be undertaken to ensure maintenance, that is, that actors have been able to sustain action for a while and are working to prevent relapse.

The goal would be to give the highest rewards, say financial, to political parties that have terminated gender inequality in their operations and have zero temptation to return to their old unhealthy habits as a way of coping. Similarly, relapse or recycling which marks regression action or maintenance to earlier stages would be punished through a financial penalty. As an example, any violation of gender principles at any level of the candidate selection process: aspirants, candidates and elected representatives would be made public and charged with a fine calculated according to the level of non-compliance.

Conclusion

Thus exclusionary practices witnessed during the March 2013 elections stem from a combination of individual and systemic factors of inequality which crippled women's agency as members of political parties, the women's movement, political aspirants and voters. At the individual level, women struggled with a sense of gender identity where they only saw themselves as "women" and not as political leaders. As a result many struggled with balancing the social behaviors critical to effective functioning in political engagement with the behavior and responsibilities considered appropriate along stereotypical gender roles.

At the systemic level Kenyan women as aspirants and voters alike are still constrained by the gender system of power relationships in the election process. This clearly spells out that men are expected to lead, determine, control and

make changes while women follow and obey even when they are negatively affected by the rules, decisions and threats made by men. Exclusionary practices during the elections of March 2013 demonstrated that in politics as in other areas the gender system still organises who controls resources and determines who is 'seen' and who is 'invisible' who is 'counted' and who is 'named'.

The impact of these individual and systemic barriers is also reflected in the manner of implementation of the two thirds gender principle during the elections. Legislative gender quotas at the county level, in accordance with Article 177 (1b and 3) of the constitution and voluntary gender quotas by political parties was instituted without addressing these structural and systemic barriers. This is further compounded by the situation in Kenya where proportional representation is only practiced for nominated seats based on seats won based the first past the post system.

A quota system must be compatible with the electoral system in place if it is to deliver for women. Quota rules for party lists and appointive positions must be supplemented with the rule defining effective legal sanctions for not adhered to the gender rule and party strategies to increase the number of women in the application of voluntary party quotas. Examples include the zipper system by the Social Democratic Party and at least 50 per cent women in party lists by the Green Party in Sweden bearing in mind the rank order which in Kenya is equivalent to party strongholds. It is important to remember that regardless of election system in operation, nominations to run for a political seat are a crucial stage for which the power of decision rests with the political parties, not with the voters. Thus political parties remain the real gatekeepers to women's access to political office and can choose to take appropriate action. It is also important to lay emphasis on enhancing women's political leadership capacity and economic empowerment through deliberate strategies. This strategy should adopt the two basic strategic approaches -empowerment and rights-based.

One major lesson that women have learnt throughout their struggle for gender equality is the fact that their interests, rights and needs will never be automatically recognised or guaranteed unless they articulate them and fight for them. The culture of politics and electoral process in general marginalises women's voices and priorities. Institutional arrangements are still hostile to women's participation and no legislative arrangement can guarantee women realise even the minimum requirement of at least one third representation. Furthermore, capacity-building tools for women have not resulted in women actually claiming their potential of influence and power.

Thus, where women and communities do not effectively organise themselves to engage political parties and relevant election structures, the constitutional emphasis on the women's rights and access to political space and decision making remains aspirational without any direct and discernable impact on their wellbeing and quality of life after the 2013 elections.

Women appear to fare better where they are able to organise themselves into strong economic locomotives through strengthening women savings, borrowing and micro investment capacities. This calls for prioritising women's economic empowerment as a key strategy to political achievement. While "laws legislate for equal opportunity, they do not and cannot legislate truly equal access to that opportunity" (Hennig & Jardin 1977:12). Laws, while useful for defining authority, do not create synergy and at best results in compromise. This is what happened in the 2013 elections. As the UN women Country Director, Ms Zebib Kavuma, observes; "the sense of urgency now is to interrogate ourselves on how we can get committed to make change in our little spaces and to have a common glue that holds us together." And this will only happen when actions taken go beyond "simply mainstreaming women" or manipulating women to join "the polluted stream." Actions designed to break the exclusionary practices and better negotiate gender issues must be "about cleaning the system, changing stagnant pools into fresh flowing waters" (Basiri 2005).

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Negotiated Democracy: A Double-Barrelled Sword

WINNIE V. MITULLAH

Introduction

Kenya has a complex history of political regimes characterised by negotiations and alliances. Most of the alliances revolve around ethnic and regional blocks. Dating back to 1963 when Kenya attained independence, there were divisions along ethnic lines reflected in the formation of many ethnic parties, which later coalesced into two, Kenya African Union (KANU) and Kenya African Democratic Union (KADU). KANU represented the dominant ethnic groups, mainly the Luo and the Agikuyu, while KADU represented the minority ethnic communities who feared the threat of domination by larger groups after independence. This fear, related to marginalisation of some communities, centralised governance and skewed allocation of resources, triggered the call for constitutional reforms and inclusive governance, which intensified during the 1990s. Negotiated democracy, which is the focus of this chapter, is one of frameworks which have been applied for ensuring that all interest groups within an electoral area irrespective of their numerical numbers are represented in governance.

Negotiated or consociational democracy is often prompted by sharp divisions in society. In Africa, the divisions are often along ethnic, clan and party lines, which create cleavages that are often difficult to resolve through the conventional liberal democracy of majoritarianism. According to Lijphart (1969), negotiated democracy is a mechanism for making democracy work in societies divided along ethnic lines. It implies a government of elite designed to turn a democracy with a fragmented political culture into a stable democracy. Lijphart (*ibid.*) further observes that “when high stakes are involved simple majority does not resolve issues or does majority rule suffice during crisis even in the most

homogenous democracies”. In such situations, negotiated democracy has potential to consolidate peace, stability and equality of the citizenry by addressing tensions and divisions through accommodation, albeit with challenges.

This chapter uses Kenya’s 2013 elections to examine the concept and practice of negotiated democracy using the experience of Migori County. The elections were unique elections; the first under a devolved system of government which created many new electoral positions, namely: governor, deputy governor, senator, women representative and members of County Assemblies. Those elected to these positions represent larger constituencies than was previously the case. Most of these areas cut across sub-ethnic and ethnic groups and required new techniques of mobilising votes.

The chapter acknowledges negotiated democracy as a mechanism of power sharing among different categories of elites, but questions its credibility as a democratic instrument and mechanism for dispute resolution. The mechanism seems to be a double barrel that resolves one problem—tension among elites but creates a new problem manifested in conflict between those negotiated-in, those negotiated-out and their respective political parties and constituencies. In this complex scenario, the ordinary voters are totally out of the game, but expected to vote those negotiated-in, an expectation with mixed outcomes as demonstrated in this chapter.

The chapter discusses negotiated democracy as a mechanism of power-sharing among different categories of the elite using Migori County as a point of reference. The cases of Nakuru and Busia Counties are also briefly referred to. The chapter examines whether negotiated democracy enhances democratic practice or undermines it and the type of accountability mechanisms necessary to ensure adherence to negotiated pre-election agreements. The chapter is informed by a review of secondary materials and a few key informant interviews from Migori County and experts on electoral politics.

Understanding negotiated democracy

Although negotiated democracy has a long history globally, its application in Kenya and the rest of Africa, except for South Africa, is not well documented. Notwithstanding that, the practice raises a number of questions that require research and understanding. Negotiated democracy as a framework assists in the terrain of majoritarian governance, in particular where tensions and inability to get a winning majority among various interest groups, communities and

individuals exist. In Kenya, negotiated democracy has been applied to address existing ethnic and sub-ethnic cleavages that are often more glaring during local and national elections.

The majoritarian interpretation of the basic definition of democracy is “government by the *majority* of the people.” In this model majorities govern and minorities oppose those that govern (Lijphart 1999). However, most democracies do not meet this ideal type of competitive, majoritarian, Westminster democracy (Armingeon 2002). Authors such as Lehmbruch (1993) have argued that majority rule is not the dominant decision rule. Rather, decisions are taken in the course of bargaining as compromises characterised by inclusiveness, bargaining, and compromise (Lijphart 1999) occur. This form of democracy has been termed negotiated democracy (Kaiser 1997; Armingeon 2002), or consensus democracy (Lijphart 1999). Therefore, the terms negotiated democracy and consensus democracy are used interchangeably in this chapter.

Ever since Lijphart’s sketch of the political situation in the Netherlands in which he illustrated how elites resolve the societal conflicts through negotiation rather than competition, the country has been known as a prototypical example of consensus democracy. It has further been observed (Lijphart 1999), that consensus democracies are among the best performing democratic states. Their governments have high legitimacy (Andeweg & Irwin 2005), the levels of equality between their citizens are higher (Armingeon 2002; Lijphart 1999) and that their policies tend to be long term and are more successful (Armingeon 2002).

Lijphart emphasises that power-sharing solutions are best for creating a durable long-term accommodation of cultural differences (Lijphart 2002) leading to more peacefully co-existence within the borders of a single nation-state (Lewis 1965). This is premised on the fact that power-sharing arrangements are thought to mitigate conflict among leadership elites (Lustick 1979), and, secondly, community leaders are thought to promote conciliation among their followers and to encourage acceptance of the settlement (Lijphart 1969). Van der Karwe (2009) notes that consensus democracy can be used to settle conflict between societal groups, while adversarial democracy is suitable to address conflicts between the elite and the masses. The former corresponds with a limited conception of democracy in which the primary goal is just to avoid tyranny, while the latter serves the more ambitious goal of keeping elites responsive and accountable by promoting competitive behaviour. For Dlamini

(2008), negotiated democracies seek to manage conflicting interest by allowing the people to compete according to agreed rules and mediated by institutions. This is aimed at fulfilling one of the main functions of any democracy of ensuring the equality of citizens to avoid potential disputes likely to arise from inequalities.

Negotiated democracy is considered an ambitious ideal applicable to unstable societies usually threatened by internal discord. However, the model has been criticised for various methodological, theoretical and empirical reasons. Common criticisms include: lack of accountability (Andeweg 2000; Pennings 2005), responsiveness (Pennings 2005), lack of a real opposition (Andeweg 2000), the ability of minorities to change or block decisions supported by a majority (Andeweg & Irwin 2005; Armingeon 2002) and slow decision-making (Andeweg & Irwin 2005; Armingeon K. 2002). Negotiated democracy has also been criticised for its limited democratic elements (Fakhoury-Muhlbacher 2008). Some analysts question whether the power-sharing model built on elite supremacy and predominance over the followers really takes into consideration important democratic criteria (van Schendelen 1974). Furthermore, there are still debates over prescriptive values and nature of negotiated democracy.

Thus, although the model addresses tensions in unstable contexts, it has its shortcomings, which are often wished away as elites look for short-term solutions. Successful cases of the model, which have been empirically tested, are indeed rare, hence drawing one's attention to the limited and narrow margins of the model's applicability (Fakhoury-Muhlbacher 2008). Lustick (1979) argues that due to the weak scientific character of the model, negotiated democracy lacks precise tools of verifiability and has a rather restrained predictive potential.

Of particular concern to this chapter is the debate whether negotiated democracy enhances democratic practice or undermines it. Although it is widely accepted that this form of democracy allows large societal divisions to be bridged and may even prevent civil war in extremely divided societies (Shapiro 2002), the democratic credentials of consensus democracy are often put into question. A major inconsistency in the negotiated democracy theory is the issue of favourable conditions that make the model work (Fakhoury-Muhlbacher 2008). Unlike Lijphart who argues that these favourable conditions are not binding, others lay emphasis on the determining character of the conditions, and assert that these factors are necessary to fashioning power-sharing (Pappalardo

1981). The fact that there are still no reliable indicators to measure and evaluate the feasibility and performance of a negotiated democracy weakens the application of the model.

Given the differences between negotiated democracy and more adversarial forms of democracy, it becomes clear that both have strong points and weak points. This makes Andeweg to conclude that both styles of democracies can be appropriate in certain situations but not in others (Andeweg 2000). Barry (1975) argues that negotiated democracy may work in societies divided along religious or ideological lines but not in the ethnically divided societies. Andeweg's conclusions contrast against Lijphart's (1999) main finding, which contends that consensus democracy, is empirically shown to be at least as good as the alternative in each case. These contentions can only be resolved through empirical evidence, which this chapter attempts to do, albeit with challenges. This type of analysis requires in-depth fieldwork which is not done for this chapter. Notwithstanding this, the chapter provides a good reference for beginning to reflect on negotiated democracy in Kenya, in particular in the county governments' elections.

Negotiated democracy in Kenya 2013 general election

Since the transition to multiparty democracy in 1991, Kenya national elections has always generated conflicts but not of the magnitude experienced in the 2007 elections. In particular, the race for the Presidential elections was tight, and saw a number of ethnic groups coming together to oppose one dominant ethnic group, that had dominated governance of Kenya from independence. This resulted in contested elections, which eventually generated into ethnic violence across the country. In turn, it attracted external arbitration by a panel of African eminent persons who facilitated a negotiated MOU for shared governance between the two Presidential candidates and their political parties. Although this particular negotiation through an MOU is not the subject of this chapter, it provided a landmark and a point of reference for negotiated democracy in Kenya's democratic landscape.

Kenya's 2013 general election was largely peaceful despite fears of a repeat of the widespread violence that followed the 2007 election (Blanchard 2013). Nevertheless, many of the socio-economic vulnerabilities that contributed to electoral conflict in 2007 general election remained relevant in 2013. These included tension over resources, in particular land; unemployment, inequality,

ethnic, clan and party differences. The latter three largely drove negotiated democracy at national and county government levels prior to the 2013 elections. This chapter examines the county level negotiated democracy using Migori with cross references to other counties with potential ethnic tensions.

The peaceful 2013 national elections in Kenya has been attributed largely to the negotiated democracy that was pursued in a number of counties, and at national level. Leaders in several ethnically heterogeneous counties such as Migori, Nakuru and Busia and at national level negotiated for pre-election coalitions and power sharing deals. They pushed for political power sharing among various interest groups and political parties in their regions, which were largely viewed as hotspots for potential violence during elections. In this process, several politicians rescued and resurrected their careers through intense brokerage while at the same time undemocratically locking out others.

Actualisation of the deals was made through a number of channels largely dominated by the elders and political party elites. The ‘elders’ of different ethnic groups organised close-door meetings to decide on power-sharing arrangements and division of electoral seats, while party elites either worked with them or had their parallel efforts. In isolated cases, other interest groups such as teachers, professional groups and out-going politicians also supported the efforts of the elders or had their own negotiation platforms as voting blocks. Some of these processes were supported by civil society organisations (CSOs). The leaders of such groupings also penetrated the different negotiation platforms, sometimes as representatives of their groups, or as individuals exploiting political opportunity out of the existing tensions. These processes were loosely referred to by the then National Cohesion and Integration Commission (NCIC) chairman Mzalendo Kibunja as ‘negotiated democracy’ (Ombuor 2013). Mzalendo considered negotiated democracy in a linear manner, noting that it was a catalyst for national healing and stability. To Mzalendo, negotiated democracy was inclusive and could move the country to a more democratic realm that galvanises the electorate towards common issues, rather than the primitive one anchored on tribe, clans and other selfish party interests (*Daily Nation*, December 9, 2012).

One unique aspect of the negotiation platforms was the close-door nature of the processes. Apart from the public knowing that there were ongoing negotiations and the posts being negotiated hardly any details of the process existed which makes the process a grapevine for research. Even though the exact terms of the negotiations were not known in advance, the mere perception of negoti-

ated democracy had a stabilising effect among the rival communities. To some extent this demonstrates the power of elites and their influence over voters. Once there was an agreement among elites, the next step was to popularise the agreement and rally votes for the negotiated candidates.

The section below uses Migori County to demonstrate what took place and to set ground for analysis of what negotiated democracy means in the democratic landscape of Kenya, albeit with limitation. As indicated in this conceptual framework, the model lacks precise tools of variability and the information used in this analysis are anecdotal and aimed at beginning to grasp dynamics of negotiated democracy for future comprehensive research.

Case study experience

A perusal of multi-ethnic counties' across Kenya reveals the dominance of particular political parties in such counties. The dominant parties also reflect the dominant ethnic groups in respective county. Taking the case of Migori which is a cosmopolitan county with the Luo, Kuria, Luhya, Kisii and Somali ethnic communities, the Luo constitute the majority, followed by the Kuria. The dominant political party was and remains the Orange Democratic Movement (ODM) headed by Raila Amollo Odinga who was a Presidential candidate in 2013 elections, under a coalition of parties branded as CORD. This is reflected in the Migori County Assembly composition which has 63 elected and nominated county assembly members. These members are drawn from 11 different political parties, one independent candidate with ODM dominating the assembly (Table 1).

Table 1: Migori County Assembly party membership

Party Affiliation	No
Orange Democratic Movement (ODM)	41
WIPER	5
URP	2
UDF	2
Ford Kenya	2
PDP	2
NPK	1
Agano	1
PDU	1
TNA	1
UDM	1
Independent Candidate	1

At the onset of electioneering almost all candidates, especially from the Luo community wished to contest through the ODM party. This essentially meant that the Kuria would have very minimal chances of getting any major seats such as governor, senator and women representative for the County. Instead due to the majoritarian democratic practice they would only end up with Members of Parliament and County Assembly members of individuals drawn from wards within their community. Considering that allocation of resources is done through the County, holding no key positions would not only disadvantage the Kuria, but had potential for breeding tension among the two ethnic groups, which has always been simmering since the two ethnic groups shared the former Migori District

Historically, the Kuria and the Luo communities who share Migori County have remained divided on the sharing of power and resources in the region with the Kuria alleging that they have been marginalised over the years. Towards the 2013 elections, it became clear that the Kuria were not willing to go in with a winner-take-all model as this would lead to the perpetuation of domination by the Luo. On the Luo side, there was a threat that if negotiations were not done, the Kuria would not vote for Raila who was a Presidential candidate. The matter had come up during Raila Odinga's campaign tour with the then Kuria MP, Wilfred Machage, leading local Kuria leaders in petitioning the ODM presidential aspirant to use his influence to make sure the county seats were equitably distributed "in a boardroom arrangement". "We are ready to support you but only if you demonstrate that we will not be marginalised by the populous Luos in the county. This fear has plagued us for some time and informed my decision to oppose the new Constitution during the referendum vote" (Machage quoted in Otieno (2012). David Mwita, a local leader, was of the opinion that the Kuria should be given the posts of Senator and Deputy Governor as a demonstration of desire of unity in the county. In response, Odinga urged the local leaders to form a negotiation committee¹ with representatives drawn from the two communities to discuss the proposals. He further suggested that the aspirants all vie on ODM tickets to make work easy. This was a strategy for reducing inter-party competition and threat from other parties.

Party negotiations and election outcome

Before the negotiations for governor began, the position had attracted a number of aspirants: Omodho Anyanga; Okoth Obado; Mark Nyamita; Owisio Ngao; and,

Oyugi Akong'o. For senator, the seat had attracted, Collete Suda, Ochieng Mbeo, John Magaiwa, Wilfred Machage, Pharez Oluoch Kanindo, Zablon Owigo Olang, Charles Oyugi Owino, Jack Baraza, immediate former area MP Ocholla Ogur; Phillip Makabong'o and, Polycarp Ochillo. Most of these contestants came from the Luo community and somehow the Kuria did not see their chances of winning posts within the County unless there was some negotiation between the two communities. Although the Luo and the ODM party constituted a block majority vote for County seats, the need to get Presidential votes and support from the Kuria pushed the ODM political party to lobby for negotiated democracy between the Luo and the Kuria. While the details of this negotiation, is a subject for in-depth research, the move saw a number of candidates who had prepared for election for many years negotiated out of the race, while others accepted being left out with promises of other political benefits. A few others were not willing to exit the race on political promises. Instead they shifted political parties and remained on the ballot.

When the deal finally came through, the Luo community was to cede the positions of senator, and deputy governor to members of the Kuria community as a way of uniting the county and building strong relations between the two communities in the devolved system of government (Miruka & Oluoch 2013). Although this chapter does not provide the details of negotiation, the Luo under CORD seem to have lost in the negotiation. There were three positions to be negotiated with the Kuria community: governor, senator and deputy mayor. The post of governor was to come from the Luo community while the post of Senator and Deputy Governor was to come from the Kuria community. The rest of the positions, including women's representative were open for competition among the two ethnic groups, although they were not as competitive as the position of the Governor and Senator.

While the negotiations went on well, the posts remained competitive and conflictual after a number of candidates shifted parties to remain on the ballot. This outcome was largely triggered by poor ODM party nominations, which saw losing candidates being given nominations by ODM. During the nominations, there were four candidates for governorship, and according to ODM Elections Board, Oyugi Akong'o won the ticket, but Obado rejected the outcome and shifted to PDP party with a Kuria running mate. Another loser, Anne Anyanga, a Luo, was given ODM party ticket as Deputy Governor to Oyugi Akong'o, while the fourth candidate dropped off. Although the negotiations had resolved that

David Mwita, a Kuria would be the running mate of Oyugi Akong'o for governorship, ODM changed this along the way and insisted on Mrs Anne Anyanga, a candidate that had lost nominations to be a running mate to Akong'o (*Daily Nation*, January 27, 2013). This marked the beginning of negating a pre-election agreement, and consequently the fall of ODM. This shift of a running mate to the ODM governor candidate, and manipulation of primaries which resulted in Obado losing and shifting parties totally disorganised the negotiation equation, and put ODM on the losing end.

In the negotiated deal, the Kuria community was expected to vote for Cord presidential candidate Raila Odinga as well as ODM's candidate for governorship. In addition, although not negotiated, the Kuria were expected to have soft spot for ODM and affiliates of CORD within their constituencies and wards. However, the results produced a mixed outcome, which was assessed differently by each of the negotiating communities. The deal started crumbling from the moment there were flawed nominations for the ODM gubernatorial ticket and women's representative. Obado, one of the candidates vying for ODM ticket, felt short changed and decided to change party to PDP, while a women's representative candidate, Benita Ghati of ODM party from Kuria appealed to the IEBC Dispute Resolution Tribunal against the ODM party nominations and won.

Obado with a Kuria running mate, David Mwita, won the seat beating the preferred ODM candidate Oyugi Akong'o. Although Obado's election was contested up to the Supreme Court of Kenya he managed to retain his seat. The Akong'o and Obado saga in Migori was a wobbled outcome whose explanation goes beyond negotiated democracy. The outcome which went against the negotiated agreement can be explained by the messed party primaries which saw a swoop of candidates but a retention of ethnic balance. The Luo community retained governorship as was negotiated, but with different candidate in a different party, while the Kuria also retained Deputy Governorship, with the same candidate in a different party. The position of Senator was won as negotiated by Wilfred Machage, a Kuria who had shifted to ODM after some negotiation. However, the Luo community expectation of taking the position of Woman County Representative was not achieved. This gave the Kuria community more positions than the two negotiated positions of Senator and Deputy Governor.

In principle, one can argue that negotiated democracy worked in Migori by default in respect to ethnic balance relating to the position of Governor and Deputy Governor; while it did not work in respect to individual candidates and

party alliances. The poor conduct of party primaries overshadowed the negotiations and undermined the victory of the candidates who had been fronted during the negotiation. Anecdotal information from the County indicated that the ODM elections were manipulated and preferred candidates of the electorate were not given nomination tickets. The fact that a candidate who failed to get a party ticket ended up winning election, to some extent authenticates the anecdotal evidence of manipulation of party tickets. Ordinarily one can argue that the preference of the voters prevailed irrespective of the party interest and negotiations which took place. In any case, both the two strong candidates for the governor position belonged to the Luo community and the issue of ethnicity did not arise, as far as the majoritarian principle is concerned. The only advantage Obado had was having a Kuria as a running mate, while his opponent Akong'o had a Luo, who had lost nominations as a running mate. Obado was able to get both the Luo votes, and the Kuria votes since his running mate was a Kuria.

The Kuria seem to have gained more than the Luo community because they exploited both negotiated and non-negotiated benefits. ODM on the other hand, was not able to get the 'six piece' voting model that they had assumed following negotiation for respective positions. The party did not only lose governorship but also lost the Deputy Governorship, and Presidential seat. This created tension, especially considering the fact that, the Kuria votes for ODM Presidential candidate was not that good. Furthermore, no ODM candidate won any of the two constituency seats (Kuria East and Kuria West) within the Kuria community.

The pre-election deals were not preferred by some of the aspirants, especially those who were asked to step aside and pave way for 'the chosen ones.' Some saw the move as unfair, as noted by one of the Senator aspirants: "When I resigned as Secretary of Gender, I did not know that I will be a victim of negotiated democracy. Now I am jobless and I have spent most of my earnings in the campaigns... this move is unfair in all contexts," Collete Suda, told Odinga at a public rally after the deal was reached (quoted in Otieno 2012). Suda had dedicated about two years preparing the ground for the 2013 elections, and it took a few meetings of elders and party elites to push her out of the race. Other potential candidates affected by the process saw it as an outright assault on democracy, "We respect our Prime Minister (Raila Odinga) a lot, but he should allow us to freely exercise our democratic rights since this is what he has championed

ever since he joined politics,” said Onyango, a supporter of Mr Ochieng Mbeo, one of the senatorial candidates requested to step aside (quoted in Otieno 2012).

The quotes from the various aspirants who were put off the race raises questions on whether negotiated democracy enhances or undermines democratic practice. While there is no straight answer to this question, it is clear that at individual level, democratic rights were undermined. However, looking at the public good, potential threat of violence and the totality of the County one can argue that the principle of negotiation is good. However, three factors are a drawback to the process, first negotiation is done by few elites at the expense of other elites and the ordinary citizens who vote and hold stake of the county. Secondly, party nominations are poorly conducted with most candidates remaining in the dark and out of the many negotiations. Thirdly, the citizens who are most critical as voters hardly have any role to play in the negotiations which remain an elite affair. These factors partly explain the defeat of the ODM candidate for the governor and deputy governor positions. The public and the opposing elites had their preferred candidate although the race was tight the winner had originally been negotiated-out but was resilient to take a second option which won him a seat.

The manipulation that is embedded in party politics and nomination process undermines democracy and good governance. Although it serves the party elites, it disenfranchises the electorate and reduces party popularity. In most cases, the party leaders assume that they have the leeway to give some of their staunch supporters’ direct party ticket without going through the party primary elections, or through manipulation. While this can be justified if done in advance, it is difficult to justify in cases where candidates are cheated into wasting money to compete while in reality there is no competition.

Overall, the outcome of Migori elections had mixed reactions from the two dominant communities, with the Luo left disappointed. Some Luo observers and politicians felt it was not appropriate to give Wilfred Machage senatorship position. Instead CORD should have used nominations to satisfy the Kuria community if they did not succeed to get a key elective seat. Others felt the Kuria were not honest and did not fully honour the negotiated deal, while one anonymous commentator referred to this type of behavior by political parties as fraudulent. As expected the Kuria did not have a problem with the outcome, according to an article by Kenan Miruka and Nick Oluoch (Standard Digital 2013) Kuria politicians such as Matiko Bohoko felt the deal was honoured. According to Bohoko,

Raila got more votes in Kuria than any other Presidential candidate. Furthermore, of the 12 electoral wards ODM won nine out of 12 which was a tremendous improvement from the previous election when only one councilor was ODM. To Bohoko, the few votes for Raila were due to a number of mistakes from both sides among them, allowing other candidates to contest senatorship with Machage. This caused mistrust among the Kuria. He also felt that the Kuria were not given campaign resources for Presidential seat, a position disputed by Luo politicians who noted that Raila made more visits to the Kuria than Luo community during campaigns

Negotiated democracy irrespective of the outcome is not unique to Migori and has been experienced in several other counties with heterogeneous communities and groups. In fact one expert in reference to the case of counties in Kisii noted that most Kisii constituencies are not homogenous and there was some negotiation during election of key positions such as that of governor, senator and women representative. This indicates that negotiation for political positions is not limited to ethnicity, in cases where there is ethnic homogeneity, other factors including sub-clan and kinship issues divide communities and may require negotiation to resolve tensions with a hope of ensuring inclusive outcome.

Counties such as Nakuru and Busia also applied negotiated democracy principle during the 2013 elections. Nakuru County is home to diverse ethnic groups which include the Kikuyu, Kalenjin, Luhya, Luo, Maasai, the Abagusii the Kamba and the Meru. During the 2007 post-election violence it was one of the hotspots, and since then negotiated democracy has been pursued. Negotiated democracy demanded that all the communities sign a peace accord that would bind them to ensure that they agree on some of the issues that were likely to cause conflict (Mkawale 2013). This process was led by the elders, who came up with the Nakuru County Peace Accord, with the help of Centre for Humanitarian Dialogue. Many saw it as a major step forward in interethnic dialogue, as it stated grievances and actions to overcome past disputes (Woodrow Wilson School of Public and International Affairs 2013).

It was believed that if the Kikuyu won all of the countywide seats in Nakuru County, other ethnic groups in particular the Kalenjin would see that as a violation of their perceived settlement and would have taken to the streets. This informed negotiation to ensure a power sharing deal, which not all agreed with. Koigi Wamwere has argued that negotiated democracy in Nakuru is undemo-

cratic because it leads to electing leaders, not because they are able leaders, but merely because they are Kikuyu, Kalenjin, Luo, or Kamba (Wamwere 2012). Justin Muturi, the Speaker of the National Assembly opposed the framework noting that it disenfranchises individuals and the negotiations are done by an amorphous group of elders seating under a tree and choosing who should be given what seat. (*Daily Nation*, December 9, 2012). Analysis in this chapter reveals that the negotiation is not limited to elders and in some cases dominant political party leaders or political elites lead the process.

Critics of negotiated democracy say that the power-sharing arrangement has further alienated other minority ethnic groups in some counties that are dominated by one or two ethnic groups. This is to some extent true because the key political positions to be negotiated and shared are few and cannot be equally shared across the diverse ethnic groups as reflected in the case of Migori. Consequently, it is communities with fewer numbers, whose votes hold less weight who suffer in cases of multiplicity of ethnic groups, hence supporting the retrogressive governance theory of tyranny of numbers. In Migori, there are more than two ethnic groups, but the negotiation was largely limited to two ethnic groups.

Adherence to pre-election arrangements

Adherence to pre-election arrangements has been a major challenge in Kenya beginning with the MOU between President Kibaki's National Alliance Party of Kenya (NAPK) and Raila Odinga's Liberal Democratic Party (LDP) which came together under the National Rainbow Coalition (NARC) in 2002. Although these were different forms of agreement, with well outlined protocol for sharing positions and governance, they were never honoured. Unlike this national case, the Migori case was botched even before elections, demonstrating the challenges of negotiated democracy.

Assessing adherence to pre-election arrangements is quite complex, especially at the county level, where most of the negotiations were conducted in a close-door manner. The Migori negotiation was spearheaded by ODM chairman Raila Odinga and involved many factions. One faction of former Members of Parliament made unsuccessful attempt to take charge of the negotiations, but Raila remained at the centre. When he brokered the deal, ODM agreed to leave the Senate position to the Kuria with Machage as the candidate. This post was critical since Machage, an influential Kuria politician, also had his own demand,

specifically, to be given direct party nomination. His direct nomination automatically meant that his competitors were locked out of the contest without consultation. This partly explains how the negotiations were messy.

The other pre-election negotiated post was that of governor and deputy governor. The Luo were to take the governorship and the Kuria deputy governorship. However, this negotiation was negatively affected by the botched nomination process which saw Obado change political parties and ODM blunder by nominating both the governor and the deputy governor from the Luo community, contrary to the agreement. This gave Obado an advantage since he took a Kuria as his deputy which eventually contributed to his win. There was therefore adherence to the pre-election arrangements only as far as ethnic balancing was concerned for the position of governor and deputy governor, but not as far as individuals and party affiliation was concerned. The situation was further complicated by the fact that a Kuria won the position of county women representative. Since this post represents the interests of all women in the county, it is key and should have been negotiated. The mixed election outcome in Migori remains a source of tension and potential conflict in the county and it is likely to resurface in the next elections.

As noted in the conceptual framework, Lijphart outlines four prerequisites of negotiated democracy based on elite active behaviour and accommodation: leaders should be aware of the dangers lurking beneath the system, should commit to preserving the system, be able to surpass segmental cleavages and join in common effort, and work out appropriate solutions to various communal problems (Lijphart 1969). This did not apply to Migori where some factions, including contestants, were not privy to the negotiations and were very disappointed when their ambitions were cut short. It seems the theory is based on stable democracies with strong parties with less likelihood of shift of party alliances within a very short period, as happened in Migori.

Lijphart also came up with a list of favourable factors to negotiated democracy: the number of ethnic groups, their size, degree of fragmentation, the impact of external dangers, overarching loyalties, socio-economic differences and traditions of compromise on internal cohesion (Lijphart 1977). As discussed in the case of Migori, ethnic competition and tension was demonstrated as each of the two major ethnic groups had shifting allegiance based on ethnic affiliation and party politics. Although there are four ethnic groups within the county, contest was limited to only two groups, the Luo and the Kuria. This is a threat to

negotiated democracy. The Luhya and the Somali were not happy with the deal, although their reservation did not become a political issue during the campaign, but it is likely to surface in future electoral politics. Significantly, Junet Mohamed, a Somali was elected M.P for Suna East. The National Cohesion and Integration Commission (NCIC) listed Migori as a hot spot with potential of being hit by election violence (*Daily Nation*, 2012).

In Kenya, negotiated democracy has been sustained by use of proportional distribution of influence in the broad public sector through appointments to ensure adequate representation of all groups (Binningsbo 2005; Kanyinga 2009). This is beginning to manifest in county governments as well, although this chapter did not investigate this aspect. However, devolution through county governments has provided opportunities for groups to express their identity and retain their autonomy (Kanyinga 2009). Kanyinga argues that the stability of negotiated democracy depends on the trust the elites have for each other and the extent to which they are committed to accommodating their rivals (Kanyinga 2009). In the Migori case, it seems there was no trust because the negotiations were not transparent and inclusive.

Adherence to pre-election arrangement largely depends on the honesty and relations of the individuals and parties concerned. However, in cases where the deal does not fully succeed as in the case of Migori, where the Kuria gained more than expected, pre-election arrangement can create new tensions. Due to the double edge nature of the outcome, both ethnic groups are skeptical about adherence to the negotiated arrangement. On the other hand, the voters who voted for ODM for the governor and senator seats blame those who did not vote for ODM for not honouring the pre-election arrangement. This has caused a simmering hostility between the two ethnic groups and the supporters of the governor, and those of Oyugi Akong'o who lost elections. This tension has to be effectively managed for the 2017 national elections or any election that requires the two communities to vote a candidate that represents the entire county.

Conclusion

This chapter has discussed both the conceptual tenets of negotiated democracy and some of the practical outcomes of the model. The discussion reveals the precarious nature of negotiated democracy, although theory maintains that it is sustained by the elites. Analysis shows that sustaining negotiated democracy, especially in young democracies goes beyond the elites to include ordinary

voters, and those negotiated-out. Our case study of Migori County demonstrates the central role of the electorate and those negotiated-out. In cases where the latter is smart and able to ignore negotiation deals, change political party and remain on the ballot, the outcome can be a double barrel as discussed in this chapter.

The double barrel is complex and has both losers and winners who have to nurture new forms of relations if synergy of governance is to be achieved. In the case of Migori, synergy has been quite difficult to achieve due to the protracted election petition case which left the county divided. The losing side which led the pre-election negotiations, followed by a protracted post-election court case, is not active. This leaves the electorate and the elected representatives at the centre of the equation. However, the divided electorate cannot generate an elite group to lead any post-election negotiations, while the elected officials have formed new coalition(s) which require a study of its own.

Notes

1 The author was not able to interview members of the committee, an aspect which would have enriched this chapter.

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Reforming the Electoral and Governance System in Kenya: “The Mixed-Member Proportional Representation” with Consociational Safeguards

MICHAEL CHEGE

Introduction

According to the late Samuel P. Huntington, the “third wave” of the global surge for democratic governance started with the Portuguese revolution of 1974, peaking up with political liberalization in Eastern Europe following the fall of the Berlin Wall in 1989, and the return of multiparty democracy to Africa and the spread electoral systems reform based on proportional representation has been repeatedly presented as an institutional tonic for conflict-prone ethnically plural societies like Kenya, seeking to institutionalise democratic governance.¹ Though some observers like Larry Diamond detected evidence that the wave was over as early as 1996, Marc Platter was to declare that it had “petered out” for certain by 2014 as evident from political regress to authoritarian rule in the regions Huntington mentioned and most poignantly by the monumental setback to democratization in the Middle East following the 2011 Arab Spring.² Between the optimism of 1991 and the measured disappointment of 2014, one of the most widely discussed issues was the role that electoral system reforms should play in consolidating democracy in newly-democratizing states if not in the older democracies as well.

This chapter makes the case for electoral system reform in Kenya in favour of closed party list proportional representation with some contested individual constituency member seats; a system colloquially referred to as “mixed member proportional” (MMP) representative system. However, it considers such reform as a necessary but not sufficient condition for a steady resolution of the political crises that arise from ethnic mobilisation of the vote driven by ethnic-political alliances of convenience to gain electoral pluralities (or majorities as is the case since 2010) as the route to legislative and executive power. To get the full benefit from MMP, the chapter argues, Kenya requires complementary reforms consistent with a more inclusive “consociational” democracy. The case for MMP and the associated consociational reforms suggested here goes beyond the traditional one made for proportional representation: i.e., that it produces a better approximation between the way in which votes are distributed to all political parties, and the manner in which the parties themselves are allocated seats in the legislature and their relative share of political power.

Although popular imagination in Kenya claims that ethnic bloc-voting was created by the chicanery of post-independence government, there is adequate evidence that even before independence, Kenya’s ethnic groups had demonstrated a durable tendency to cleave around one party, admittedly with a few exceptions. This phenomenon is unlikely to disappear no matter how loud the political sermons for cross-ethnic unity and nationhood, but the worst aspects of it—the politically destabilising exclusion of some groups from government and legislative influence—might be mitigated by a more-inclusive electoral and governance system. Proportional representation might advance inclusiveness to the advantage of the smaller, under-represented groups, other complementary institutional tools in crafting a more inclusive governance system better suited to the sharp ethnic cleavages that have been an enduring part of Kenya’s electoral politics since the first election based on universal adult franchise in February 1961, now need to be brought in. The democratic form of government advocated here is “consociational democracy” as defined most pre-eminently by Arend Lijphart among others.³ Consociational democracy accepts as a given the sharp cleavages in a country’s ethnic and cultural segments of the kind that characterise Kenya, and aims for a more inclusive governance system in spite of the differences. And even though a proportional allocation matching total party votes to total party legislative seats are a key part of the formula, so is propor-

tional representation of social and cultural segments in key branches of government. Such measures include “grand coalition” government of major parties as an enduring feature of government rather than as a transitory convenience that was hastily contrived as a peace-making measure for Kenya between 2008 and 2013. Other political implements for consociationalism include federalism, a minority veto, a parliamentary system of government as opposed to the presidential one which Kenya has functioned under since 1964, cultural and linguistic autonomy, an independent judiciary, and independent central bank.

Most important of all, consociational governance assumes “elite consensus” as its core foundation. Without elite consensus then all political bets are off; without it the consociational edifice crumbles under its own violent weight as happened in Lebanon (a successful consociational democracy between 1943 and 1975) at the outbreak of the civil wars there in the late 1970s. With stronger dedication to an inclusive national cause than one admittedly finds among ethnic elites in Kenya today, consociational democracy could narrow the space for ethnic rivalries, that are prompted in large part by feelings of ethnic exclusion, real or imagined, under the winner-take-all majoritarian electoral system that Kenya has applied in one form or another since 1961, and which the 2010 constitution dealt with only in part, particularly through devolution. Building on the 2010 constitutional provisions, therefore, is one aim of this chapter.

Electoral system reform as democratic institution-building

Reforming the electoral system—the method by which voters elect those who rule them, enumerate the outcomes, and decide the winners—has been one of the most effective tools in advancing the cause of democratic governance even before “the third wave”. Electoral systems have far reaching consequences not just in determining who governs but also in shaping the character of party systems, voter behaviour, widening political space for excluded groups, and for political stability, state legitimacy and viability. Until recently, most African countries adhered faithfully to the electoral systems of their ex-colonial masters—mainly Great Britain and France—and desisted from experimenting with electoral systems that have worked effectively elsewhere. But that is gradually changing, not just in Africa but also in a number of emerging democracies elsewhere⁴. An increasing number of African states have now grafted proportional representation in elections onto the colonial-era majoritarian systems that they inherited, thereby producing the MMP hybrid. Under the 2010 Constitution,

Kenya made some tentative systems for a more inclusive electoral system by creating special seats for women legislators and the physically-challenged, and by allocating a limited number of non-constituency seats on a proportional basis to political parties. To a very small extent Kenya intuitively moved into the realm of MMP without acknowledging it.

Reforms in that direction could be taken further yet. This is because even in the established industrial democracies, democracy is always a story of construction in progress. Sequential institutional reforms go with the democratic territory because having granted citizens the freedom of thought, assembly, movement and the right to vote according to the dictates of one's conscience, it stands to reason that in any democracy, proposals on reform for more perfect governance will be made perpetually. Making reform demands is the unavoidable outcome unconstrained individual freedom. This is why, for instance, following the defeat of the proposal for Scottish independence at a referendum in September 2014, Great Britain—the founding nation of plurality and majority-based electoral systems—is now debating the prospects of proportional representation in addition to deep-seated constitutional reforms such as devolving more financial and governance responsibilities not only to Scotland but also to Wales, Northern Ireland having already assumed its own separate consociational structures after the Good Friday Agreement of 1998. This has opened to debate as to how England itself will fit into all this, and on the future structure of the “mother of parliaments” at Westminster which has never known any elections not conducted on the basis of a simple majority. After the 2010 Constitution, Kenya should consider yet more reforms that will make it an even better democracy. Chances that this will occur are not as bleak as many “Afro-pessimists” in Kenya and out of it continually inform us. Electoral systems reform ought to be part of a wider, ever-evolving constitutional reform agenda.

Douglas Rae's pioneering study on the political consequences of electoral laws demonstrates that electoral system choice affects the nature of party systems that emerge to compete in elections and the broader political calculations of the individual voter as well.⁵ First-Past-the-Post (FPTP) electoral systems under which any single constituency candidate who wins either a majority or plurality of votes (as in the UK or US) is declared elected tends to produce two strong parties, whereas proportional representation tends to nurture proliferation of political parties while—on the positive side—widening voter representation in legislatures. All electoral systems come with clear benefits and

drawbacks: none of them produces absolute correspondence between voter choice and legislative party shares; in general they tend to under-represent small parties in national or regional legislatures; and they tend to “manufacture” majorities in legislatures that do not correspond to the distribution of votes to parties. Countries must, therefore, select polling systems that suite their situations best, an argument that has been made with remarkable force of late by Morse and Schneiner.⁶ That is one reason why Kenya and the rest of Africa should accelerate the debate on electoral systems towards better democracy in the never-ending process of democratisation.

A Review of electoral systems and their application in Africa: Lessons Learnt.

Broadly speaking, electoral systems fall under two large families: (I) the “Proportional Representation” (PR) family which attempts to make the proportion of the votes cast for parties as close as possible to their representation in the legislature, if not in the executive as well. (II) the “Plurality and Majority” cluster of rules under which winners are decided on the basis of which candidate among many contesters in a single-member constituency receives the most votes (a plurality), or a majority (upwards of 50 per cent) of the total valid ballots cast. Additionally, there is a third cluster of electoral systems, usually referred to as “mixed”, that combine characteristics of the two main ones.

As mentioned earlier, the Mixed-Member Proportional system advocated here combines some single-member competitive seats and additional seats allocated to parties in proportion to the total votes each party gained. In practice, democratic countries increasingly reflect diversity between plurality/majority systems, PR, and mixed systems in legislative elections. The most distinguishing characteristic of the British and US FPTP system is the single-member constituency in which winning candidates are those who receive most of the votes, but not necessarily the majority. FPTP has the attraction of simplicity, strong accountability of legislators to a geographically-defined constituency, and a tendency to strengthen the two-party system. However, it is criticised for short-changing the smaller parties (and groups) in parliamentary representation and for an inadequate representation of women. In countries like France, the two-round system requires run-offs among leading candidates in cases where none of them receives an outright majority the first time. In the run-offs, the weakest candidates are excluded and a plurality can be used to declare a winner.

There is one more type of majoritarian voting system entitled the Alternative Vote (AV), Australia and Ireland being the prime examples. Because of the way it works out, it is sometimes called “the instant run-off vote”. Under the Alternative Vote, voters are required to indicate their preference for candidates in descending order from first, second, third to the last, the outright winning candidate being the one who receives an absolute majority as the first choice in the first round. Should no candidate achieve that, the competitor who received the lowest amount of number-one preferences is then eliminated, and his or her votes then distributed to the candidates shown as the second choice in his or her ballots, a redistribution process that continues until an overall winner with a majority is identified. The Alternative Vote has been applied in Ireland’s presidential elections, but not in any African state so far. In another but less popular subset of the plurality/majority electoral systems—the Block Vote—voters in multi-member constituencies choose between parties each of which fronts an agreed number of candidates. As under FPTP, the party with the most votes takes all the districts seats. Among African countries, it has been applied in Mauritius, Chad, Senegal and Cameroon, and with wide public acceptance.

Few African countries have moved from the UK-style FPTP and the French-style run-off system bequeathed by colonial rulers to PR and mixed electoral systems. Of the 52 countries examined by the International Institute for Democracy and Electoral Assistance in 2010, nearly half (28) adhered to majoritarian electoral systems under either FPTP (16) or plurality with run-off (12), while 15 were under PR and mixed-member polling systems. Over time, however, and in spite of the colonial electoral heritage, there are now more African states using PR or mixed systems than at any other time since independence in the 1960s. Out of experience more African democracies, as in the rest of the world, are adopting PR and MMP systems.

Table 1: Breakdown of African countries by electoral system of National Legislature: 2010

FPTP	Majority/Run-off	PR	Mixed
Botswana	Cameroon	Algeria	Guinea (C)
Ethiopia	Central Afr. Rep	Angola	Lesotho
Gambia	Chad	Benin	Senegal
Ghana	Congo-Brazzaville	Burkina Fasso	Seychelles

FPTP	Majority/Run-off	PR	Mixed
Kenya	Comoros	Burundi	Tunisia
Malawi	Gabon	Cape Verde	DR Congo
Nigeria	Djibouti	Mauritius	Egypt
South Sudan	Mali	Guinea (B)	Libya
Swaziland	Gabon	Morocco	Sudan
Tanzania	Madagascar	Mozambique	
Uganda	Mauritania	Namibia	
Zambia	Togo	Niger	
Zimbabwe		Rwanda	
Ivory Coast		São Thomé	
Madagascar		South Africa	
Sierra Leone			
Liberia			
Total			
17	12	15	9

Source: Stockholm: International Institute for Democracy and Electoral Assistance web site:
www.idea.int/esd/world.cfm.

Some of the countries now pursuing a PR Party List electoral formula had done so out of choice. Morocco, Burkina Fasso, Cape Verde and Sao Tome are the best examples. This is a result of deliberative democracy producing innovation in the quest for a better system of government. But in a considerable number of countries in that category, PR had been adopted as part of the political bargain to bring more political inclusiveness in countries emerging from deep-seated internal conflict based on, among other things, internal social and cultural cleavages. This was prominently the case in South Africa after apartheid, but also in Burundi, Sierra Leone, Mozambique, Rwanda, and Algeria after prolonged civil conflict. Lesotho's adoption of a mixed system must also be understood as part of her quest for a more inclusive and stable national politics, after repeated episodes of conflict between parties, the military, police and the monarchy. All this attests to the properties of PR as a conflict resolution mechanism in highly polarised societies.

To sum up the African experience with different varieties of electoral systems, recent research on the subject supports proportional representation as a tool for more political harmony in conflict-ridden pluralistic societies in comparison with majoritarian polling rules. This is especially the case when proportional representation is combined with inclusive governance constitutions of the kind proposed in this chapter under consociationalism.⁷ The same argument has been applied to Kenya in at least two studies. In a technically savvy pioneering paper published in 1997, Stephen Ndegwa argued on the basis of a simulated model using the 1992 election results, that proportional representation would have increased representation of Kenya's ethnic minorities and hence multiethnic political collaboration, as opposed to the paralysing ethnic polarization that resulted under the Kenya version of FPTP.⁸ At the same time, Ndegwa demonstrated that an Alternative Vote in presidential elections would have produced "a more widely acceptable candidate" than the plurality (37 per cent) which brought Daniel arap Moi back to the presidency in 1992. Considering the results of the contested 2007 general election, Roger Southall concluded that Kenya could have benefited from experiments in widening ethnic representation in southern Africa, through the medium of proportional representation, among other governance tools.⁹ Chris Masitta for his part advocates proportional representation in Kenya as a tool for extinguishing "ethnic hegemony in the executive" by a few ethnic groups.¹⁰

Comparing FPTP and PR outcomes in Kenyan elections

Yet with the exception of Ndegwa (1997)¹¹ none of these studies have proceeded to demonstrate what difference any proportional representation would have made in comparison with the existing plurality systems. Kenya's electoral system faithfully followed the British FPTP system for the most part until the 2013 general election when, as stated earlier, some reforms introducing special seats for women and the physically-challenged allocated in proportion to votes cast became part of the polling framework. Another major change introduced by 2010 Constitution related to presidential elections, which brought in a run-off rule in case no presidential candidate garnered over 50 per cent of the vote. Prior to the 2013 election, however, there was a major change introduced under the 1997 Inter Parties' Parliamentary Group agreement. It apportioned the 12 national seats, (members of Parliament nominated after the polls) in proportion to strength of each party in parliament. This was a major victory for the political

opposition battling the Moi autocracy and which had campaigned vigorously for “no elections without electoral reforms.” Previously, the selection of the 12 nominated members of Parliament was the prerogative of the President. In effect, this introduced an element of PR to the Kenyan legislature, turning the electoral system into an MMP one, if only to a very limited extent. In effect, only 3.5 per cent of Kenya’s National Assembly was appointed under PR system as opposed to 55 per cent in New Zealand, 50 in Germany, and 33 per cent in Lesotho. It was a small advance, but a start nevertheless.

Going back to the colonial-era elections, there were only two elections held under adult suffrage prior to independence: 1961 and 1963. The Kenya African National Union (KANU) won both. As far as the 1961 election was concerned, KANU won 76 per cent of the total votes under the “common roll open seats”, but took only 19 (or 57 per cent) of the total seats while in comparison, KADU got 18 per cent of the total votes cast but earned 11 legislative seats amounting to 33 per cent of total positions in the colonial legislature; that is double the proportion of the votes cast for it.¹² This was primarily due to “malapportionment” which favoured regions in which KANU was least popular in the opinion of the colonial government, which saw KANU as a mortal threat with a radical nationalist platform compared to KADU’s moderation and quiescent disposition to Kenya’s white settler minority. As Table 2 below indicates, within 76 per cent of the vote, KANU would have taken 25 of the “open seats” compared to KADU’s six, had the election been held under a PR formula.

Table 2: The 1961 “Open Seats” (African) elections under FPTP as compared to PR

Party	FPTP VOTE	%	FPTP SEATS	%	PR SEATS	PR SEATS GAIN + LOSS -
KANU	590,661	76	19	57	25	- 6
KADU	143,079	18	11	33	6	+ 5
BPU	28,817	4	1	3	1	0
Smaller Parties & Independent Candidates	20,057	2	2	6	1	- 1
Total	782,614	100	33	100	33	

Source: George Bennett and Carl Rosberg, *The Kenyatta Election*, (Oxford University Press, 1961)
Calculations by the author. NB: Percentages may not add up due to rounding.

As it turned out, KANU refused the offer to form a government unless Jomo Kenyatta was released from prison. Yet even if—assuming PR was applied—KANU had formed the government with an even larger majority in the colonial Legislative Council than it did as the opposition, this would not have resulted in any inter-ethnic political tranquillity. Even in government, KADU was agitating for “majimbo”, an ethnic federalist constitution as a safeguard against domination by Kikuyu and Luo who formed the bedrock of KANU. KADU’s legal constitutional advisor at the Lancaster House conference that framed Kenya’s post-independence Constitution in 1962, Dr Edward Zellweger, was in fact a Swiss lawyer rationalising the constitution of the Swiss confederacy as a model. KANU on the other hand sought a strong unitary state in line with the pan-Africanist ideas of the day, with guarantees for individual liberties that would safeguard any ethnic group from discrimination. To this contestation, PR alone might not have provided an answer. Better ways would have had to be found to assuage the smaller ethnic groups that supported KADU and its allies who were motivated by fears of exclusion in government by the ethnic alliance that dominated KANU then, Kikuyu, Luo, Kamba, parts of the Luhya, Kisii and Taita. And that solution as the compromise arrived at the 2010 Constitution demonstrated was to be found in decentralised governance—an aspect of consociationalism—with 47 county governments. Resurrected from the 1960s, “Majimbo” had been a valued slogan of the ODM campaign in 2007. In 2010, Kenya settled for the county governments as a compromise and this played a major role in preventing a dangerous increase in the country’s political temperature as had occurred in the recent past.

The last colonial-era election conducted on universal suffrage without reserved seats took place in 1963, and the outcome of the result under the FPTP system as compared to what the outcome under PR would have been, is presented under Table 3 below.

Table 3: The 1963 House of Representatives electoral results under FPTP as compared to PR

Party	FPTP VOTE	%	FPTP SEATS	%	PR SEATS	PR SEATS GAIN + LOSS -
KANU	988,311	(53.6)	83	(66)	65	- 18
KADU	476,218	(23.8)	33	(27)	32	- 1
APP	137,008	(7.43)	8	(6.5)	9	+ 1
BPU	14,896	(0.81)	0	(0)	1	+ 1
Coast PP	9,135	(0.50)	0	(0)	1	+ 1
Independent	218,311	(11.84)	0	(0)	14	+ 14
Total	1,843,879	(100)	124	(100)	123	

Had the election been conducted entirely in the PR format, KANU would have been 18 seats short of the 83 seats (66 per cent) of the total comfortable majority that it had in the House of Representatives. PR would have given KANU an advantage in 1961, but a disadvantage in 1963. With only 65 seats (51 per cent of the total), it would have found it unavoidable to forge an alliance with the either KADU or (more likely) APP, which is what happened ultimately by the end of 1964 when KADU and APP joined KANU. PR with a grand coalition became the answer and this should not have been as regrettable as it would sound to purists of the winner-takes-all majority persuasion. In the end, KANU absorbed KADU and APP into a grand coalition that ruled between 1964 and 1966 with political tranquillity and economic growth that were to be interrupted by the schism between left and right wings in KANU in 1966, and the increasingly exclusive and authoritarian posture assumed by the government thereafter.

In 1966, the “Little General Election” was held in which for the first time the government demonstrated heavy-handedness in responding to the challenge posed to by the new Opposition party, the Kenya Peoples Union (KPU).¹³ In the circumstances, it is unclear what difference the PR would have made in these circumstances. Under the FPTP system, the KPU received fewer seats than its vote share of the total votes cast warranted. Under the PR system, it would in all likelihood have done better in Parliament. It would also have been saved the image of being a predominantly Nyanza-based party since, even under the

hostile political environment of the period it had received considerable votes outside that region as well, and which could not obtain representation in parliament.

The 18 by-elections that characterised “the Little General Election”, as it turned out, were to be the last conducted on the basis of two-party competition for a long time. Multiparty competition in Kenya was brought to an end by the proscription of the Kenya Peoples Union Party in 1969. Kenya’s Constitution was amended to make the country as *de jure* one-party State in 1982. The country was not to witness competitive party elections till 1992. A determined struggle to restore Kenya to a genuine multiparty democratic state starting from early 1991, and in which the pro-democracy movement was subjected to imprisonment, beatings and deaths, led to constitutional changes allowing the formation of opposition parties once again in 1992.

The first general election to be held under the rules of multi-party competition after independence, therefore, took place in 1992. This is the first clear case where PR would have resulted from a very different outcome in comparative party strength in Parliament in comparison with the FPTP plurality system that Kenya applied. This is the election in which Ndegwa compared the effect of FPTP and the Alternative Vote. The figures are not to be taken at face value for, as Throup and Hornsby demonstrated, these elections were marred by government-sponsored violence against the opposition, especially in the Rift Valley region, fraud, intimidation and rigging.¹⁴ As far as National Assembly votes were concerned, KANU reportedly won 25 per cent of the votes that translated into 100 seats out of 188 (53 per cent of the elective seats in the legislature) while FORD-Asili took 21 per cent of the vote which translated into only 31 seats. For its part, the Democratic Party of Kenya obtained 19 per cent of the vote but won only 23 seats, while FORD-Kenya got 17 per cent of the vote but won just 31 seats. Had PR been applied, KANU would have obtained 46 seats rather than 100. FORD-Asili would have obtained 38 seats, as compared to 35 that would have gone to DP and 31 to FORD-Kenya. In effect, KANU would have been a minority in the legislature in much the same way it was at the polls. Again, a lot of this had to do with “malproportionment” of the constituencies in addition to FPTP, and the electoral malpractices identified by Throup and Hornsby among others.

Table 4: Comparing FPTP and PR at the 1992 General Elections

	Total Votes	FPTP %	PR	
KANU (Moi)	1,962,866 (36)	100 (53)	68	- 32
Ford-A (Matiba)	1,404,266 (26)	31 (17)	49	+ 18
DP (Kibaki)	1,050,617 (20)	31 (17)	37	+ 6
Ford-K (Odinga)	944,197 (17)	23 (12)	32	+ 9
Others	38,378 (1)	3 (1)	2	—
Total	5,400,324	188 (100)	188	—

However, for the sake of argument, let us assume that the presidential ballot was a reflection of how Kenyans would have cast their vote for the contesting parties under PR. This is not unreasonable because under an unalloyed PR system, voters would have cast their ballots for a specific party and by implication, the list of constituency candidates the party had selected and ultimately the party's leader who would lead the party in parliament. In this case the outcome of the PR system (as conceived here) compared to the FPTP results in 1992 would have been as presented in Table 4 above. Even with the malpractices, KANU would still have been defeated by the combined Opposition under a PR system. And even with the legal prohibition against parliamentary coalitions, which KANU legislated for unilaterally a few months before the election, KANU would have found it extremely difficult to govern since it would have had 68 parliamentarians as opposed to 120 in the Opposition. KANU's ethnically-based politics had divided the country deeply but even if the Opposition had managed to secure power under PR, it too would ruled over an ethnically-divided house since its government would have excluded the KANU communities in the Rift Valley, most of the Coast and parts of western Kenya. And that would not have made for easy governance either unless some conciliatory measures like representation of these regions in the cabinet and senior public service were made, in line with consociationalism.

Table 5: Comparing the 1997 electoral outcomes under FPTP versus an assumed party list PR

Party	FPTP VOTE	%	FPTP SEATS	%	PR SEATS	PR SEATS GAIN + LOSS -
KANU (Moi)	2,445,801	(40)	113	(51)	89	- 24
DP (Kibaki)	1,895,527	(31)	41	(19)	69	+ 28
NDP (R A. Odinga)	665,725	(11)	22	(10)	24	+ 2
FORD K (Wamalwa)	505,542	(8)	18	(8)	18	0
SDP (Charity K. Ngilu)	469,807	(8)	16	(7)	18	+ 2
Others	114,077	(2)	12	(5)	4	+ 2
Total	6,096,479	(100)	222	(100)	222	

The theme of coalition-making as a peace-building measure, given Kenya's fragile and ethnically-divided parties, reappears from an examination of the distribution of the vote in 1997. As in 1992, there were serious questions about the veracity of a KANU overall victory. But from the FPTP column in Table 5, it is clear that even with the dubious results, KANU could barely govern given its slim margin in Parliament. All it would have taken in a motion of no confidence to topple the government at this stage was for three KANU MPs to join with the opposition. Moi and his advisers must have been aware of this. As a result, KANU forged a coalition in all but name (given the legal strictures against any form coalition-building) with the NDP in 1998 that enabled it to rule between 1998 and 2002. In the end, NDP dissolved itself in order consummate its alliance with KANU. This resulted in some limited power-sharing between NDP and KANU that enabled the government to last until the end of its term in 2002, when disagreements between the coalition partners over the New-KANU standard bearer led to a mass defection by NDP (now reincarnated as the Liberal Democratic Party (LDP)) to the massed ranks of the Opposition led to the defeat of KANU. Rather than see 1998 to 2002 as the extension of the old KANU era, as is often stated, it is therefore best to see those years as an experiment in grand coalition-making of the self-preservation variety. In this case, however, KANU's poisoned chalice could not even permit the barest move towards a more ethnically tolerant and democratic Kenya. That threshold was to be crossed with heightened verve by

yet another coalition in 2002 that led to real advance to democracy before internal suspicions and betrayals splintered it in 2005 in advance of the 2007 elections.

Table 6: Comparison of the 2002 electoral outcomes under FPTP as compared to party list PR

Party	FPTP VOTE	%	FPTP SEATS	%	PR SEATS	PR SEATS GAIN + LOSS -
NARC (Kibaki)	3,647,658	(61)	132	(59)	138	+ 6
KANU (Kenyatta)	1,836,055	(31)	68	(31)	69	+ 1
FORD-P (Nyachae)	345,161	(6)	15	(7)	13	- 2
Others	34,598	(1.0)	9	(3)	2	- 7
Total	5,863,472		222	(100)	222	

The redistribution of seats in the 2002 parliamentary elections between the two systems showed the least variation compared to past. The coalition of parties under NARC that unseated KANU in 2002 would have gained six extra seats under PR bringing their numbers in Parliament to 136, giving NARC a 62 per cent majority as opposed to 59 per cent that it had under the FPTP formula. That is a small marginal gain. The biggest losers under PR would have been the smaller parties (Sisi kwa Sisi, Safina, FORD-Asili, and others) which had nine seats collectively that would have been reduced to two. The reason for that is those parties mostly presented popular constituency candidates who won over competitors from the larger parties.

Here again, one must interpret the results with caution. But the fact remains that the 2002 elections were the most ethnically unifying in Kenya since independence. As a matter of fact such was the relief even in KANU areas that a new more-ethnically inclusive system based on the rule of law and devoid of corruption would usher in a new dawn in Kenya. NARC its fair to remember was a grand coalition itself combining the LDP and the National Alliance of Kenya. Even more important, it was headed by a geographically (and hence ethnically) representative “Summit” of political grandees from all the major regions of Kenya. In addition, the coalition came to power under a memorandum of power-sharing

with a number of new positions at the top that a NARC-majority parliament could have approved: two vice presidents, and a prime minister with two deputies all distributed fairly across the regions. The “Summit”, the grand coalition, and the memorandum of understanding were quintessential consociational institutions arrived at intuitively by a Lijhart-style pro-democracy “elite consensus” of the type that had eluded the country in the previous two elections. This suited Kenya. It was the height of folly for one segment of the NARC grand coalition, the one closest to the president, to unilaterally abrogate the memorandum of understanding, to eliminate the element of power-sharing and—after the government lost the 2005 constitutional referendum—to contrive to drive off the dissenting wing of the coalition out of government. The bitterness of the losing side, which had cultivated the coalition with such devotion in 2002 was to manifest itself in the next round of Kenyan general elections.

The 2007 election is etched in the political history of Kenya in bloodshed, and it will be remembered for that for a long time to come. The violence that resulted from the announcement of the presidential election on the evening of 29th December 2007 was the most vicious that the country has seen since the anti-colonial Mau Mau rebellion of the 1950s. The Johann Kriegler Commission which was appointed to examine the veracity of the results concluded that the evidence, from the polling stations upwards was so hopelessly contaminated that it was impossible to tell what the accurate outcome truly was.¹⁵ The commission documented and lamented a tradition of impunity in the application of violence to determine electoral outcomes sanctioned by individuals in power, in addition to disregard of the laws and regulations governing the electoral process from primary at the constituency to presidential polls at national level. However, an exit poll conducted by two experts in that discipline—James D. Long and Clark Gibson of the University of California, San Diego—under the sponsorship of the International Republican Institute in Washington DC reported that Raila Odinga had won the presidency with a plurality of 46 per cent to Mwai Kibaki’s 40 per cent.¹⁶ Violence on a grand scale against Kibaki’s supporters began as soon as the presidential elections were announced. In the din of the post-election violence, PNU adherents claimed they had won the election while the ODM proclaims it was robbed victory, and that the violence was spontaneous. The official 2007 results, data presented in Table 7 below, comparing FPTP and PR, must therefore be read against that backdrop.

Table 7: Comparison of the 2007 electoral results under FPTP and PR

Party	FPTP VOTE	%	FPTP SEATS %	PR SEATS	PR SEATS GAIN + LOSS -
PNU (Kibaki)	4,584,721	(46)	82	102	+ 20
ODM (Odinga)	4,352,993	(44)	108	98	- 10
ODM-Kenya	879,903	(9)	18	20	+ 2
Others	59,411	(1)	14	2	- 12
Total	9,877,028	(100)	222	222	

Hypothetically, PNU would have won an additional 20 seats under PR while ODM would have lost 10 seats with ODM-Kenya gaining two more seats. The smaller parties would have been the second-biggest losers under PR, gaining two seats only rather than 14. But the most important lesson of the 2007 election debacle does not lie in these figures. They are to be found rather in the consociational methods under which the crisis was resolved: a grand coalition government of all the major parties; near-equal power-sharing in the cabinet and all major state appointments, an informal mutual veto since neither side could initiate any major policy without consulting the other. Those Kenyans who think coalition governance between 2008 and 2013 was a lousy experience that bears no repeating forget that it was the form of government that saved the country from an immanent bloody implosion and state failure. In that case it was a price that had to be paid. It also may be the reason why Kenya obtained a new constitution. Equally important, the structures agreed upon so laboriously to resolve a bloody crisis in 2008, actually mimicked some aspects of the informal negotiations and the memorandum of understanding arrived at by the two wings of NARC in 2007: a power-sharing cabinet, a prime minister with two deputies, and the mutual veto.

The 2013 electoral outcomes were controversial, but unlike those of 2007, not violent. But even then the CORD alliance has argued in and out of court that it was robbed of electoral victory. Again the figures of the results must be read against that backdrop. The outcomes of the results under FPTP as compared to PR are illustrated in Table 8 below.

Table 8: Comparison of the 2013 electoral outcomes under FPTP as compared to PR

Party	FPTP VOTE	%	FPTP SEATS	%	PR SEATS	PR SEATS GAIN + LOSS -
Jubilee (Kenyatta)	6,173,433	(51)	167	(48)	178	+ 11
CORD (Odinga)	5,340,546	(44)	141	(40)	154	+ 13
UDM (Mudavadi)	483,981	(5)	24	(7)	17	+ 10
Others	223,083	(0)	17	(5)	0	- 17
Total	12,221,053	(100)	349		349	

Hypothetically, under PR, the Jubilee Coalition Alliance coalition would have gained an even larger majority than it obtained under the existing FPTP system, corresponding to the vote count it at the presidential ballot. But this could not have solved the problem of ethnic cleavages that largely correspond to party differences; representation in the Jubilee Alliance government leaves out half the country that is concentrated in in distinct geographical regions—former Nyanza Province, Nairobi, lower Eastern, and Coast. And this has led to real political discontent in these regions, discontent borne of exclusion. Yet again, had victory gone to CORD as its leaders believe should have happened, then half the country's voters domiciled in the Mount Kenya region and the Rift Valley for the most part would have been left out of government. And that would have led to ethnic discontent as well. In Kenya's ethnicity-driven politics neither choice is ideal. Each choice comes with politically destabilizing potential. Even here, the solution is best found by power-sharing arrangements but most important of all by a parliamentary system of government requiring the threshold of say 66% of the members of parliament to form a government. In that manner, and given the near-even split in voter outcomes, each side would have been forced to look for allies in the opposite side of the divide. That in turn could lead for bargaining over a fair allocation of top government positions. And that might have provided Kenya with a better and less ethnically-polarized transition than it has at present.

Conclusion: The case for MMP with consociational measures

This chapter opened with the argument in support of a mixed member representative system for ethnically-divided societies like Kenya. It was subsequently stated that electoral systems reform alone are inadequate to promote greater political calm and inclusiveness without recourse to deeper consociational measures such as extended power-sharing, decentralisation of power and federalism, political and cultural autonomies as well as grand coalition governments. A review of how election results under a PR system would have differed with Kenya's FPTP since 1961 reveals that in some cases PR would have promoted more ethnic inclusiveness than FPTP, but not in others. It is therefore best to think of a repertoire of political measures that would advance more ethnic inclusiveness in addition to the PR. In that vein, the chapter has argued for further efforts at electoral and constitution review to see what combination of interventions would serve the country best. Such continuous adjustment of political institutions to emerging realities is, as we demonstrated earlier, the hallmark of all democracies including the older industrial ones. In Kenya's case, remaking the electoral system bears a re-examination in the post-2010 experience, for if there is one thing this chapter brings out, it is that majoritarian systems of the sort Kenya has at legislative and presidential level divide more than they unify even when they are free and fair.

In a powerful rebuttal of the notion that proportional representation provides "fairer" outcomes than do FPTP systems in predominantly agrarian societies like those of Africa, Joel Barkan argued in 1995 that although PR may have the virtue of facilitating power-sharing between elites in ethnically pluralistic societies like Kenya, it had been rated poorly in linking voter interests to legislators since in rural communities personal contacts and ethnic clientilism are the channels used to make demands and voice grievances.¹⁷ For Kenya specifically, Barkan was convinced that the single constituency member system rendered legislators more accountable to the voters by dint of what they resources leaders mobilized from the national government and from local "harambee" sources. He might have added that in addition, where votes are mobilised in chunks of ethnic blocs, chances are that PR results would mimic those of FPTP in the first instance, and hence the need of other measure to bridge ethnic suspicions.

But there are ways of getting around the problem however. Under an MMP system, voters can elect constituency representatives and vote for a party list under PR at the same time, enabling a country to enjoy the main benefits of both systems. The electoral system of the Federal Republic of Germany, for instance, is based on the MMP under which a voter is provided with a two ballots: one for a district-based constituency candidate from any one of the parties who is elected on a plurality, while the other is for state-based PR list whose seats are allocated proportionately to the total votes garnered by a party. In addition (as in South Africa) there is a low (5percent of the vote or three seats) threshold that a party must meet in order to qualify for the PR share and entry into the legislature. Kenya should be thinking along these and similar directions. And the time for the initiation of that debate is now.

Notes

1 Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991)

2 See Larry Diamond, "Is the Third Wave Over?", *Journal of Democracy*, Vol.7, No. 3 (1996), and Marc Plattner, "The Third Wave Peters Out", *Foreign Policy*, July, 2014.

3 Arend Lijphart, *Democracy in Plural Societies*, Yale University Press, 1977, and Lijphart, "Constitutional Design for Divided Societies", *Journal of Democracy*, 15(2), 2004. See also W. Arthur Lewis, *Politics in West Africa*, Oxford University Press, 1965, especially pp. 64–99.

4 See Pippa Norris, "Choosing Electoral Systems", *International Political Science Review*, 18 (3), July 1997; Robert Moser and Ethan Schneider, *Electoral Systems and Political Context* (Cambridge University Press, 2012); Andrew Reynolds and John Carey, "Debating Electoral Systems: Getting Elections Wrong", *Journal of Democracy*, January 2012.

5 Douglas W. Rae, *Political Consequences of Electoral Laws* (Yale University Press, 1967).

6 Morse & Schneiner, *Electoral Systems and Political Context*, pp.

7 See Andrew Reynolds, *Electoral Systems and Democratization in Southern Africa* (Oxford University Press, 1999); S.I. Lindberg, "Consequences of Electoral Systems Reform in Africa", *Electoral Studies*, 24(1), 2005; and Matthijs Rogaards, "Electoral Systems, Party Systems and Ethnicity in Africa" in Mathias Basedau, et.al, eds., *Votes, Money and Violence: Political Parties and Elections in sub-Saharan Africa* (Nordic African Institute, 2007) Chapter 2.

8 Stephen Ndegwa, "The Relevance of the Electoral System: A Simulation of the 1992 Kenyan Election", *African Journal of Political Science* June 1997.

9 Roger Southall, "Alternatives for Electoral Reforms in Kenya", *Journal of Contemporary African Studies*, 27(3), 2009.

10 Chris Masitta, "Electoral Reforms: Extinguishing Ethnic Hegemony in the Executive", www.ir.kabarak.ac.ke:8080/bistream/handle/123456789/8.

11 See Stephen N. Ndegwa, "Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics." *The American Political Science Review*, 91(3), Sept. 1997, pp. 599–616.

12 Under the 1960 Lancaster House Constitution, the country was divided into 53 constituencies divided up as follows: there were 33 “open seats” that could be contested by all races in theory, but their being located in African-dominated regions meant essentially that they would elect African legislators thus giving Africans a majority in the legislature for the first time; some 10 seats were reserved for Europeans (though all races resident in them could vote; 8 seats were reserved for Asians and 2 for the Arabs. See George Bennett and Carl Rosberg, *The Kenyatta Election* (Oxford University Press, 1961). The statistics applied here refer to the “open seats” only.

13 Cherry Gertzel, *Politics of Independent Kenya*, 1963–68. (Nairobi: East African Publishing House, 1970), pp.73–104.

14 David Throup and Charles Hornsby, *Multiparty Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System* (Oxford: James Currey 1998).

15 Republic of Kenya, *The Independent Review Commission on the 2007 Elections* (Nairobi: Government Printer, 2008).

16 See *The New York Times*, 20th January, 2009.

17 Joel D. Barkan, “Elections in Agrarian Societies” *Journal of Democracy*, 6(4), 1995.

A black and white photograph of a slum area, likely in Kenya. In the foreground, a group of people, some wearing white hats, are standing on a dirt path. In the background, there are several small, makeshift buildings with corrugated metal roofs. A large container with the word 'MAERSK' is visible. The overall scene depicts a densely populated, informal settlement.

When voters enthusiastically turn up to cast their vote during general elections, they expect that their action would meaningfully change their lives. But in most of Africa, even when elections are held on a regular basis, voters are quite often disappointed by the performance of their leaders who use the new positions as an opportunity to loot public resources and consolidate power. It is almost as if elections are of minimal value to the populace. Notwithstanding this trend, when they are free and fair, general elections can be transformative. They can bring into the political arena men and women of integrity committed to service and accountability. Inspired by the determination to have inclusive governance and the advancement of democracy, *Kenya's 2013 General Election: Stakes, Practices and Outcomes* asks important questions related to political participation, coalition building, politics of identity, the international criminal court, electoral systems and institutions, and the judiciary. The papers are written by mainly Kenyan academics and civil society actors who examine the drivers of the 2013 general elections and the sources of the mandate to lead.

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